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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

FRANK M. JORDAN, SECRETARY OF STATE, OF THE STATE OF CALIFORNIA,

Petitioner,

v.

S. L. WEAVER, D. E. O'NEIL and T. F. GREENHOW,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

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May, 1966

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S. L. WEAVER, D. E. O'NEIL and T. F. GREENHOW,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

Petitioner, Frank M. Jordan, Secretary of State, of the State of California, prays that a writ of certiorari issue to review the judgment of the Supreme Court of California entered on March 2, 1966, in *S. L. Weaver, D. E. O'Neil and T. F. Greenhow* v. *Frank M. Jordan, Secretary of State, of the State of California.* That judgment finally struck down as violating the Federal Constitution of the United States an Act known as the "Free Television Act", designated as Proposition 15 on the November 1964 General Election and adopted by a vote of the People 4,515,013 to 2,286,775.

OPINIONS BELOW

The opinion of the Superior Court of the County of Sacramento, State of California is unreported and appears in the Clerk's Transcript on Appeal, Pages 44–49, inclusive, and is also included in Appendix "B" to this Petition.

The Supreme Court of California issued an opinion on March 2, 1966, entitled *Weaver* v. *Jordan* which appears in 64 A.C. 243, [411 P.2d 289]; 49 Cal.Rptr. 537; and also appears in Appendix "B" to this Petition.

JURISDICTION

The opinion and judgment of the Supreme Court of California was entered on March 2, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

The California Constitution reserves to the People the power to pass laws by "Initiative Process" in Article IV, Section 1, of the California Constitution. An Initiative Act passed by the People at the November 1964 General Election, known as the "Free Television Act", undertook to ban in California the business of home subscription television. The question thus presented is: Does action by the California voters in passing an Initiative Measure banning the business of home subscription television in California constitute a valid exercise of the state's police power

or does the enactment unconstitutionally abridge the freedom of speech protected by the First Amendment of the United States Constitution as applied to this State by the Fourteenth Amendment of the United States Constitution?

CONTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the following provisions of law:

First Amendment to the United States Constitution; Fourteenth Amendment to the United States Constitution; Article IV, Section 1, California State Constitution; Article I, Section 9, California State Constitution; The Californa "Free Television Act" of 1964, West's Ann. Civil Code, Sections 43-1 to 43-7, found in 1965 Pocket Supp. P. 19. Pertinent portions of the text of these provisions are printed in Appendix "A", attached hereto.

STATEMENT

On November 3, 1964, at a regularly scheduled General Election, an initiative law known as "Free Television Act" was passed by the electorate with a vote of 4,515,013 to 2,286,775. On December 9, 1964, Respondents S. L. Weaver, D. E. O'Neil and T. F. Greenhow submitted to Petitioner certain Articles of Incorporation for the formation of a corporation to be known as Advanced Tele-Communications, Inc. Petitioner refused to file the Articles of Incorporation on the grounds that the Articles provided that Tele-Communications, Inc. was about to engage in an un-

lawful business (subscription television into homes), which was forbidden by the aforesaid initiative law.

On December 11, 1964, Respondents filed a Complaint for Declaratory Relief in the Superior Court of the State of California for the County of Sacramento (Clerk's Transcript on Appeal, Pages 1-5, inclusive). Petitioner answered and filed a Motion for Judgment on the pleadings (Clerk's Transcript on Appeal, Pages 32-35, inclusive). Respondents made a Motion for Summary Judgment on February 3, 1965, contending that the "Free Television Act" was unconstitutional and invalid under both the United States and California Constitutions (Clerk's Transcript on Appeal, Page 36, Lines 24-30). The Superior Court of the County of Sacramento rendered judgment for the Respondents and held the "Free Television Act" invalid and unconstitutional because it abridged the freedom of speech contrary to the provisions of the First and Fourteenth Amendments to the Constitution of the United States, and of Section 9, Article I, of the Constitution of California (Clerk's Transcript on Appeal, Page 50). The court held the purposes of the proposed corporation lawful and that its articles conformed to law.

An appeal was taken directly to the California Supreme Court by Petitioner (clerk's transcript on appeal p. 53–54) and on March 2, 1966 that court held the act unconstitutional as an abridgement of the free speech guarantees of the state and federal constitutions.

The fact that the California Supreme Court held the Act invalid as an abridgment of the free speech guarantees of both the State and Federal Constitutions does not preclude this Court from entertaining jurisdiction on the grounds that the judgment rests upon an independent state grounds. The opinion of the California Supreme Court, though casually mentioning the freedom of speech guaranteed by Article I, Section 9, of the California Constitution, does not discuss the state grounds but relied solely on the First and Fourteenth Amendments of the U.S. Constitution. In *State Tax Commission of Utah* v. *Van Cott,* 306 U.S. 511, 514 (1939), this Court pointed out that where a state court decides the validity of a state statute on both federal and state grounds that were so interwoven that it was unable to conclude that the judgment rested upon an independent interpretation of state law, the United States Supreme Court was not divested of jurisdiction on the grounds that the judgment rested upon an independent interpretation of the state law. To the same effect is *Abie State Bank* v. *Bryan,* 282 U.S. 765, 773 (1930).

It is respectfully submitted that a reading of the decision of the Supreme Court of the State of California clearly shows that that Court predicated its decision solely on freedom of speech as protected by the United States Constitution. Although the Court mentioned the state ground (Article I, Section 9, California State Constitution), it did not discuss or ana-

lyze its application to the "Free Television Act" but relied exclusively on the provisions of the First and Fourteenth Amendments of the United States Constitution. The federal and state grounds are so interwoven that it is impossible to conclude that the judgment rests upon an independent interpretation of state law.

The provisions of law restricting the operation of subscription television into homes are contained in the Free Television Act itself which is set forth in full in Appendix "A". Essentially the Act prohibits a charge imposed upon persons in their homes to hear or see communications disseminated by means of coaxial cables or through the airways. The nucleus of the Act is found in Section 3 which asserts that the "public shall have the right to view any television program on a home television set free of charge" and "no person shall, directly or indirectly, make a charge inconsistent with such right".

REASONS FOR GRANTING THE WRIT

This case concerns a matter of great public importance because it purports to prohibit the power of the State to regulate television, a communications media, and purports to hold that television broadcasting is immune from commercial regulation by the State because it is an instrumentality of free speech and press.

Actually nothing in the Act prohibits or restricts in any way the holding, expressing, publication or dissemination of any opinion, view, idea, thought or be-

lief. There is no prohibition whatsoever on the content of any communication, oral or written. The Act merely prohibits a *charge* imposed upon persons in their homes to hear or see communications when disseminated by means of coaxial cables or through the airways. It in no way violates freedom of speech of the Federal or State Constitutions.

The First Amendment of the United States Constitution guarantees freedom of speech; it does not guarantee the right to be paid for the exercise of that freedom. Since the Act goes only to the element of compensation, not to the right of expression, the First Amendment is irrelevant in this matter. C.f., *Associated Press* v. *U.S.*, 326 U.S. 1, 20 (1945). The Act does not prohibit the transmission of television programs anywhere. It does not prohibit the transmission of television into the home, nor does it otherwise regulate means of commercially distributing television programs. Television programs may be distributed to the home over coaxial cable or radio wave through sale to sponsors. Programs may be distributed through subscription (for a fee) into places other than the home such as theaters, auditoriums (public or private), restaurants, taverns, private clubs, office buildings, automobiles, airplanes, etc.

PAY TELEVISION THREATENS IMPAIRMENT OF THE BENEFITS PRESENTLY ENJOYED BY THE PUBLIC FROM FREE TELEVISION

Judicially noticeable facts makes it reasonably apparent that pay-television (subscription charges to

home viewers) seriously threatens impairment of home television and the consequent deprivation of the public's enjoyment of the benefits now freely derivable from free television. The adverse affect of pay-television on free television was a strong reason behind the voters' adoption of the Act. The economic effect of pay-television upon existing television broadcasters and the consequential detriment to the public interest are appropriate matters for the policy-making branch of government to take into account in determining whether to permit that detriment to be suffered. Cf., *Federal Communic. Com.* v. *Sanders Bros.*, 309 U.S. 470, 473–476 (1940).

Under the ad hoc balancing theory, originating in 1939 in *Schneider* v. *State*, 308 U.S. 147 (1939) and *American Communications Assn.* v. *Douds*, 339 U.S. 382 (1950), any so-called indirect impairment of the freedom of speech is more than balanced by the salutory purpose of preserving the public benefits of free television.

The act should be upheld as a valid exercise of the police power for the general welfare of the people of the State of California. A state can prohibit or restrict the operation of a business for the general welfare of its people. *Breard* v. *Alexander* 341 U.S. 622, 631—633 (1950).

The issues involved in this case are plainly of great public and constitutional importance. We respectfully submitted that the case is worthy of this Court's attention.

CONCLUSION

Petitioner submits that the provisions of the "Free Television Act," adopted by the People of the State of California at the November 1964 General Election, do not constitute an abridgment of the free speech guarantees of the Federal Constitution and are in fact the valid exercise of the police power and an appropriate means to preserve for the public the benefits of free television.

WHEREFORE, Petitioner prays that the Writ of Certiorari issue from this Honorable Court to review and reverse the judgment of the Supreme Court of the State of California in *S. L. Weaver, D. E. O'Neil and T. F. Greenhow* v. *Frank M. Jordan, Secretary of State, of the State of California.*

Respectfully submitted,

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APPENDIX A

UNITED STATES CONSTITUTION

Amendment I

[Section 1] Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CALIFORNIA CONSTITUTION, ARTICLE IV, SECTION 1

The first power reserved to the people shall be known as the initiative. Upon the presentation to the Secretary of State of a petition certified as herein provided to have been signed by qualified electors, equal in number to eight per cent of all the votes cast for all candidates for Governor at the last preceding general election, at which a Governor was elected, proposing a law or amendment to the Constitution, set

forth in full in said petition, the Secretary of State shall submit the said proposed law or amendment to the Constitution to the electors at the next succeeding general election occurring subsequent to 130 days after the presentation aforesaid of said petition, or at any special election called by the Governor in his discretion prior to such general election. All such initiative petitions shall have printed across the top thereof in twelve-point black-face type the following: "Initiative measure to be submitted directly to the electors."

CALIFORNIA CONSTITUTION, ARTICLE I, SECTION 9

Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact. Indictments found, or information laid, for publications in newspapers shall be tried in the county where such newspapers have their publication office, or in the county where the party alleged to be libeled resided at the time of the alleged publication, unless the place of trial shall be changed for good cause.

CALIFORNIA "FREE TELEVISION ACT" OF 1964

AN ACT TO PRESERVE FREE TELEVISION IN CALIFORNIA. The People of the State of California do enact as follows:

Section 1: This Act shall be known and may be cited as the FREE TELEVISION ACT.

Section 2: The public has heretofore had available to it over existing television stations and privately owned receiving sets many different categories of free television programs, including telecasts of sporting events, political discussions, original dramatic presentations, variety programs, news programs, motion pictures and other programs of interest. The development of television in the United States has been based upon the public policy of making proper use in the public interest of existing television channels, and providing a broad range of interesting and informative programs free of charge to the viewing public. The information, instruction and entertainment derived from such programs are in the public interest. The development of any subscription television business would have an adverse effect upon presently licensed television stations which do not make a charge to viewers; and would tend to deprive the members of the public, who have made a substantial investment in television receiving equipment, of their present freedom of choice with respect to television programs, and of the information, instruction and entertainment now readily and freely available to them. It would tend to create a monopoly. For those and related reasons it would be contrary to the public policy of this State.

Section 3: The public shall have the right to view any television program on a home television set free of charge regardless of how such program is transmitted, whether in whole or in part by wires, lines, radio waves, waveguides, coaxial cable, microwave transmitters or other electronic or mechanical means or any combination thereof; and no person shall, directly or indirectly, make a charge inconsistent with such right. "Television program" includes any program of a category, form, kind, nature or type substantially similar to any category, form, kind, nature or type which was transmitted on or before the effective date hereof free of charge for reception on home television sets. "Home television set" includes any electronic or electrical device generally or customarily used for the reception of television programs in the home.

Section 4: The following contracts, agreements, or understandings, where inconsistent with such free transmission, are absolutely void and are not enforceable: (a) those made or executed after the effective date of this Act, and (b) those in existence on such effective date to the extent that they are executory.

Section 5: Any person who is injured by the violation of this Act may recover threefold any damages and may enjoin such violation and shall be entitled, in addition, to his costs of suit and reasonable attorneys fees.

Section 6: This Act shall not apply to community antenna systems or to hotel or apartment antenna systems, where no charge is made to the viewer based upon or related to program content, or to non-profit educational television systems, whether closed or open circuit.

Section 7: If any section, sentence or clause of this Act is adjudged to be unconstitutional or invalid, such adjudication shall not affect the validity of the remaining portion of this Act. It is hereby declared that this Act, and each section, sentence or clause thereof, would have been passed, irrespective of the fact that any one or more sections, sentences or clauses might be adjudged to be unconstitutional or for any other reason invalid. If any part of this Act is invalid in one or more of its applications, that part nevertheless remains in effect in all valid applications. It is the intention in this Act in respect of its subject matter to exercise the power of the State to the full extent of its constitutional power; and so, this Act shall be applicable to that extent regardless of any limitations of its applicability on the ground of a want of constitutional power.

Section 8: Chapter 5 of the First Extraordinary Session of 1963, codified as Part 15 of Division 2 of the Revenue and Taxation Code, together with all other acts which may be in conflict herewith, is hereby repealed.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA IN BANK

S. L. WEAVER, D. E. O'NEIL and T. F. GREENHOW, *Plaintiffs and Respondents,* v. FRANK M. JORDAN, as Secretary of State of the State of California, *Defendant and Appellant.*	Sac. 7682

Defendant appeals from an adverse judgment in a declaratory relief action which attacks as unconstitutional an initiative measure adopted by the electorate at the November 1964 general election, and entitled by its proponents and draftsmen the "Free Television Act" (hereinafter "the Act"). Designated as Proposition 15 on the ballot, the Act undertakes to ban in California the business of home subscription television. For reasons which will appear, we have concluded that the trial court correctly determined the Act to be invalid as an abridgement of the free speech guaranties of state and federal Constitutions.

The provisions of the Act are set forth in full in the margin.[1] Following its effective date plaintiffs as incorporators tendered to defendant Secretary of State for filing (with the requisite fees) certain articles of

[1] AN ACT TO PRESERVE FREE TELEVISION IN CALIFORNIA. The People of the State of California do enact as follows:

Section 1: This Act shall be known and may be cited as the FREE TELEVISION ACT.

Section 2: The public has heretofore had available to it over existing television stations and privately owned receiving sets many different categories of free television programs, including telecasts of sporting events, political discussions, original dramatic presentations, variety programs, news programs, motion pictures and other programs of interest. The development of television in the United States has been based upon the public policy of making proper use in the public interest of existing television channels, and providing a broad range of interesting and informative programs free of charge to the viewing public. The information, instruction and entertainment derived from such programs are in the public interest. The development of any subscription television business would have an adverse effect upon presently licensed television stations which do not make a charge to viewers; and would tend to deprive the members of the public, who have made a substantial investment in television receiving equipment, of their present freedom of choice with respect to television programs, and of the information, instruction and entertainment now readily and freely available to them. It would tend to create a monopoly. For those and related reasons it would be contrary to the public policy of this State.

Section 3: The public shall have the right to view any television program on a home television set free of charge regardless of how such program is transmitted, whether in whole or in part by wires, lines, radio waves, waveguides, coaxial cable, microwave transmitters or other electronic or mechanical means or any combination thereof; and no person shall, directly or indirectly, make a charge inconsistent with such right. "Television program" includes any program of a category, form, kind, nature or type substantially similar to any category, form, kind, nature or type which was transmitted on or before the effective date hereof free of charge for reception on home television sets. "Home television set" includes any electronic or electrical device generally or customarily used for the reception of television programs in the home.

Section 4: The following contracts, agreements, or understandings, where inconsistent with such free transmission, are

incorporation for the formation of a corporation to be named Advanced Tele-Communications, Inc. (hereinafter TC), for the purpose of engaging in the home subscription television business.[2] Defendant refused

absolutely void and are not enforceable: (a) those made or executed after the effective date of this Act, and (b) those in existence on such effective date to the extent that they are executory.

Section 5: Any person who is injured by the violation of this Act may recover threefold any damages and may enjoin such violation and shall be entitled, in addition, to his costs of suit and reasonable attorneys fees.

Section 6: This Act shall not apply to community antenna systems or to hotel or apartment antenna systems, where no charge is made to the viewer based upon or related to program content, or to non-profit educational television systems, whether closed or open circuit.

Section 7: If any section, sentence or clause of this Act is adjudged to be unconstitutional or invalid, such adjudication shall not affect the validity of the remaining portion of this Act. It is hereby declared that this Act, and each section, sentence or clause thereof, would have been passed, irrespective of the fact that any one or more sections, sentences or clauses might be adjudged to be unconstitutional or for any other reason invalid. If any part of this Act is invalid in one or more of its applications, that part nevertheless remains in effect in all valid applications. It is the intention in this Act in respect of its subject matter to exercise the power of the State to the full extent of its constitutional power; and so, this Act shall be applicable to that extent regardless of any limitations of its applicability on the ground of a want of constitutional power.

Section 8: Chapter 5 of the First Extraordinary Session of 1963, codified as Part 15 of Division 2 of the Revenue and Taxation Code, together with all other acts which may be in conflict herewith, is hereby repealed.

[2] The articles of incorporation state in article SECOND that "The purposes for which this corporation is formed are:

"a) To engage exclusively in the business of subscription television in California.

"b) To transmit television programs for viewing on home television sets by means of wires, lines, coaxial cable, or any combination thereof, and to make a direct charge upon subscribers for the right to view such television programs. As used in these articles, the words 'television programs' include any program of a category, form, kind, nature or type substantially

to file the articles on the grounds (1) they did not conform to law in that they provided that the proposed corporation was to engage in an unlawful business, and (2) the purposes of the proposed corporation were unlawful in that they are proscribed by the Act. (See Corp. Code, § 300.) Plaintiffs thereupon brought this action for declaratory relief, contending that the Act violates both the federal and state Constitutions.

Defendant answered and moved for judgment on the pleadings, and plaintiffs moved for summary judgment. Defendant's answer admits the matters already related in this opinion, but for lack of information or belief denies generally further allegations of the complaint which set forth the business plans and intentions of the proposed corporation, that several "theatre subscription businesses" are now operating in California, and that the Act exempts such businesses

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similar to any category, form, nature or type which was transmitted on or before December 7, 1964, free of charge for reception on home television sets; the words 'home television sets' include any electronic or electrical device generally or customarily used for the reception of television programs in the home.

"c) To establish a subscription television system or systems in California and to transmit or transport to California for viewing over its system or systems a substantial number of television programs and attractions made and originated in states other than California.

"d) To have and to exercise all powers conferred by the laws of California upon corporations formed under the laws pursuant to and under which this corporation is formed, as such laws are now in effect and at any time after may be amended; provided, however, that this corporation shall exercise powers only incidental with the purposes expressly set forth in subparagraphs (a) through (c), inclusive, of this Article SECOND; provided, further, that nothing in this Article SECOND shall be construed as authorizing this corporation to establish or operate any community, hotel, or apartment antenna system or systems where no charge is made to the viewer based upon or related to program content, or any non-profit educational television system or systems, whether closed or open circuit."

from its provisions.[3] The trial court concluded that the Act abridges both the state and federal constitutional guaranties of free speech. (U.S. Const., Amendments I and XIV; Cal. Const., art. I, § 9.) Accordingly, plaintiffs' motion for summary judgment was

[3] More specifically, the allegations so denied are that TC, the proposed corporation, plans and intends as follows:

"8. . . . to engage in the business of subscription television and to establish a subscription television system in the State of California.

"9. . . . to establish a closed circuit subscription television system. Programs transmitted by [TC] will be disseminated to the individual premises of subscribers over coaxial cable network channels leased from telephone companies. Individual subscribers will be connected to the coaxial cable network by a 'coaxial drop' leading to the subscriber's television set. No modification of subscribers' sets is required. Reception of television programs transmitted by others will not be affected by said . . . system.

"10. . . . initially subscribers will be able to select during hours of transmission one of three subscription television channels or music supplied by [TC].

"11. . . . to present over . . . said system sporting events, current motion pictures, plays, educational programs, and other special programs and attractions to subscribers. Each subscriber will pay a program charge for programs he may choose to view. [TC] does not intend to transmit commercial advertising over its said system; [TC] intends that its primary source of revenue will be fees received from subscribers.

"12. . . . to transmit for viewing over its said system a substantial number of programs and attractions made and originated in states other than California; said programs and attractions will be transported or transmitted by or on behalf of [TC] from said states to California."

Also denied is the following allegation: At present several companies and individuals are conducting businesses in California which are "engaged in presenting special attractions and programs, including sporting events, to individual viewers by a closed circuit coaxial cable network leased by said businesses from telephone companies ("theater subscription television"); said programs and special attractions are presented and viewed at theaters; each viewer pays a charge based upon program content to the owners of said businesses for the privilege of viewing said attractions and programs. Said initiative exempts . . . 'theatre subscription television' businesses from its provisions."

granted, and defendant's motion for judgment on the pleadings was denied. From the ensuing judgment declaring the duty of defendant to accept and file the tendered articles of incorporation, this appeal was taken. (Code Civ. Proc., § 437c.)

First Amendment freedoms of press, speech and religion are protected by the due process clause of the Fourteenth Amendment from invasion by state action. (*Smith* v. *California* (1959) 361 U.S. 147, 149-150 [80 S. Ct. 215, 4 L.Ed.2d 205, 209]); *Near* v. *Minnesota* (1931) 283 U.S. 697, 707; *People* v. *Woody* (1964) 61 Cal.2d 716, 718 [1]; *Katzev* v. *County of Los Angeles* (1959) 52 Cal.2d 360, 365 [1a], 366 [4].) Such rights have a paramount and preferred place in our democratic system, and the "rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice." (*American Civil Liberties Union* v. *Board of Education* (1961) 55 Cal.2d 167, 178-179 [9-10], quoting from *Thomas* v. *Collins* (1945) 323 U.S. 516, 530.) Accordingly, the courts have declared that any system of prior restraints of expression comes before the courts "bearing a heavy presumption against its constitutional validity." (*Freedman* v. *Maryland* (1965) 380 U.S. 51, 57-58; *Bantam Books, Inc.* v. *Sullivan* (1963) 372 U.S. 58, 70.)

The fact that the Act now before us was adopted as an initiative measure by the general electorate does not alter our approach to the claim of First Amendment infirmity. In *Board of Education* v. *Barnette* (1943) 319 U.S. 624, 638, the court pointed out that "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of

majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." (See also *Wallace* v. *Zinman* (1927) 200 Cal. 585, 593 [5].)

Inasmuch as the rights of free speech and press are worthless without an effective means of expression, the guaranty extends to both the content of the communication and the means employed for its dissemination. (*Wollam* v. *City of Palm Springs* (1963) 59 Cal. 2d 276, 284 [5]; *Kovacs* v. *Cooper* (1949) 336 U.S. 77; *Saia* v. *New York* (1948) 334 U.S. 558.)

Communication by motion picture, by radio and by television falls within the constitutional protection. (*Freedman* v. *Maryland, supra* (1965) 380 U.S. 51, 57; *Superior Films, Inc.* v. *Department of Education* (1954) 346 U.S. 587; *Joseph Burstyn, Inc.* v. *Wilson* (1952) 343 U.S. 495, 499–502; *Public Utilities Com.* v. *Pollak* (1952) 343 U.S. 451, 461–462; *Baltimore Radio Show* v. *State* (1949) 193 Md. 300, 323 [67 A.2d 497, 507], cert. den. (1949) 338 U.S. 912; *Rumely* v. *United States* (D.C. Cir. 1952) 197 F.2d 166, 177; *American Broadcasting Co.* v. *United States* (D.C.S.D.N.Y., 1953) 110 F.Supp. 374, 389, affd. on other grounds (1954) 347 U.S. 284; *Wrather-Alvarez etc., Inc.* v. *Hewicker* (1957) 147 Cal.App.2d 509, 512 [5].)

"The right of freedom of speech and press includes not only the right to utter or to print, but the right to *distribute,* the right to *receive,* the right to read. . . ." (Italics added.) (*Griswold v. Connecticut* (1965) 381 U.S. 479, 482; see also *Martin* v. *Struthers* (1943) 319 U.S. 141, 143; *Marsh* v. *Alabama* (1946) 326 U.S. 501, 505–508; *Grosjean* v. *American Press Co.* (1936)

297 U.S. 233, 250; *Zeitlin* v. *Arnebergh* (1963) 59 Cal.2d 901, 907 [1].) Also encompassed are amusement and entertainment as well as the exposition of ideas. "The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine." (*Winters* v. *New York* (1948) 33 U.S. 507, 510.)

The Act now at issue purports to totally prohibit home subscription television. We are told that subscription television consists of the origination and transmission of programs to subscribers, that programs may be transmitted either by radiowave ("open circuit") or cable ("closed circuit"). The Act undertakes to ban both methods of transmission when a charge is made to home viewers (Act, § 3, *ante*, fn. 1), but does not forbid making a charge therefor when the viewing is by audiences in a theatre. Thus the Act is entirely clear that no one may speak or disseminate ideas to the home through the medium of pay television, and, likewise, that no one in the home may listen to a pay television transmission or receive transmitted ideas or images conveying such ideas over the outlawed medium. The suppression of the proscribed medium as a vehicle of transmission to the home purports to be absolute; it amounts to total censorship, in advance, so far as home viewers are concerned.

The chief and crucial difference between presently existing home television in California, and subscription television, is the method of collecting revenues: with rare exceptions[4] existing home television collects its revenues from commercial advertisers; subscrip-

[4] We have in mind the occasional "educational" station supported at least in part by voluntary contributions from viewers.

tion television collects its revenues from subscribers. This difference provides the means by which the Act undertakes to effectively prohibit home subscription television, while at the same time imposing no bans against theatre subscription television or against existing home television which derives its financial support from commercial advertisers.[5]

When a restriction of a First Amendment freedom is of such unlimited potential scope it may be imposed only to avoid a "clear and present danger" that a substantive evil will otherwise result which the state has a right to prevent. The weighing of interests which the courts have at times found necessary or appropriate when considering a restriction more narrow in language or in application[6] may be dispensed with if, as here, the enactment is so broad as to impose a complete ban of expression and communication through a specified medium, in this case home subscription television.[7] In the event this court determines that there is such a "clear and present danger" of a substantive evil warranting the suppression of

[5] We are also told that a significant and identifying characteristic of home subscription television from the viewer's standpoint is that he will have a much greater choice in the selection of programs transmitted over subscription television systems, than over existing systems; that in subscription television there is a direct correlation between program content and revenue collected; that obviously, if subscribers do not like the subject matter of programs they will not pay to see them and the revenue of the subscription television station is immediately diminished; that consequently it will be the viewer, not the sponsor, who selects the programs broadcast over subscription television systems.

[6] See *Breard* v. *City of Alexandria* (1951) 341 U.S. 622, 644; *Martin* v. *Struthers, supra* (1943) 319 U.S. 141, 143; *Board of Education* v. *Barnette, supra* (1943) 319 U.S. 624, 630, 633-634; cf. *Kovacs* v. *Cooper, supra* (1949) 336 U.S. 77, 88-89.

[7] See *Canon* v. *Justice Court* (1964) 61 Cal.2d 446, 455-456, 459-460 [6b]; cf. *People* v. *Woody, supra* (1964) 61 Cal.2d 716, 727 [3b].

the constitutional guaranty of freedom of speech or press, it will then be necessary that we also determine whether the gravity of any such "evil," discounted by its improbability, "justifies" invasion of freedom of speech in order to avoid the "danger." (*Katzev* v. *County of Los Angeles, supra* (1959) 52 Cal.2d 360, 366, and cases there cited; see also *Dennis* v. *United States* (1952) 341 U.S. 494, 510, 513–514; *Board of Education* v. *Barnette, supra* (1943) 319 U.S. 624; *American Civil Liberties Union* v. *Board of Education, supra* (1961) 55 Cal.2d 167, 175–176; *Danskin* v. *San Diego Unified Sch. Dist.* (1946) 28 Cal.2d 536, 542 [1], 545 [3].)

In *Thomas* v. *Collins, supra* (1945) 323 U.S. 516, 530, the court declares that "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment . . . gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. [Citation.]

"For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. . . . Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." (See also *American Civil Liberties Union* v. *Board of Education, supra* (1961) 55 Cal.2d 167, 178–179.)

Any suggestion of the existence of a "clear and present danger" to be obviated by the Act here involved would be utterly specious. The Act itself states

(in § 2) that the "development" of the subscription television business would have an "adverse effect" upon existing television stations—a proposition which at the very least is debatable. The further declarations of the Act (§ 2) that subscription television "would tend" to deprive viewers of their "freedom of choice," and of the "information, instruction and entertainment now readily and freely available to them," and would "tend" to create a monopoly, likewise appear of uncertain veracity or validity. But even if such declarations be accepted as unquestionable facts, they would demonstrate no clear and present danger of any substantive evil to be avoided by the sweeping and absolute suppression attempted by the Act. Rather, as the trial court commented in its memorandum opinion herein, any suggested "evil" appears to be speculative and illusory, and well discounted by "improbability" by the recitals of the Act itself. In the event that one medium of communication and entertainment actually did in part supplant or displace its competitor in the course of exercising protected freedoms of press and speech, that is only the traditional and expected possible consequence of free choice in turn by viewing or listening members of the public of the communications they wish to receive. If monopoly practices appear or if the public interest actually suffers or is ignored it will then be time enough to apply appropriate regulation within constitutionally permissible limits. (See *National Broadcasting Co.* v. *United States* (1943) 319 U.S. 190, 226.) But the outright ban here undertaken by the Act cannot stand. As pointed out in *Wollam* v. *City of Palm Springs, supra* (1963) 59 Cal.2d 276, 284 [7], "the right to regulate [a means of communica-

tion] does not necessarily sanction the outright prohibition." [8] And as stated in *Shelton* v. *Tucker* (1960) 364 U.S. 479, 488, "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." [9]

Further, the freedoms of speech and of press protected by the First Amendment rest on "the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society." (*Associated Press* v. *United States* (1945) 326 U.S. 1, 20; see also *Griswold* v. *Connecticut, supra* (1965) 381 U.S. 479, 482.)

The assertion of defendant and of amici curiae that the Act does not invade freedom of expression because it does not prohibit subscription television, but merely forbids direct charges for programs transmitted to the home, is devoid of substance. The trial court correctly observed that "This is comparable to asserting that no prohibition of expression would exist in the case of newspapers or motion pictures if a statute were adopted requiring their distribution or showing without charge." When expression protected by the First Amendment is involved, "It is of course no matter that the dissemination takes place under com-

[8] See also *NAACP* v. *Alabama* (1964) 377 U.S. 288, 307-308; *Kovacs* v. *Cooper, supra* (1949) 336 U.S. 77, 81-88; *Talley* v. *California* (1960) 362 U.S. 60, 64.

[9] See also *Speiser* v. *Randall* (1958) 357 U.S. 513, 526, in which the court held unconstitutional a requirement of a loyalty "declaration" as a condition of tax exemption, stating: "In practical operation . . . this procedural device must necessarily produce a result which the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free."

mercial auspices." (*Smith* v. *California, supra* (1959) 361 U.S. 147, 150.)[10] In *New York Times Co.* v. *Sullivan* (1964) 376 U.S. 254, 265-266, it was recently held that a publication which communicates information, expresses opinion, recites grievances, and protests claimed abuses, is not removed from the protection of free speech and press guaranties by the fact that it appears as a paid advertisement in a newspaper. The court there declared "That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold [citations]." (Cf. *Breard* v. *City of Alexandria, supra* (1951) 341 U.S. 622, 642; *Joseph Burstyn, Inc.* v. *Wilson, supra* (1952) 343 U.S. 495, 501-502; *Bantam Books, Inc.* v. *Sullivan, supra* (1963) 372 U.S. 58, 64, fn. 6; see also 53 Cal.L.Rev. 1418-1425.)[11]

Our holding that no basis has been shown or suggested which would warrant the sweeping restriction here attempted by the Act is not, of course, repugnant to the accepted principle that the practices or business of the various media of expression or of those disseminating their beliefs or ideas may

[10] See also *Near* v. *Minnesota, supra* (1931) 283 U.S. 697, 720 ("Characterizing the publication [of malicious, scandalous and defamatory matter in newspapers] as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint"); *Murdock* v. *Pennsylvania* (1943) 319 U.S. 105 (that a religious organization solicited "purchase" of its books and pamphlets did not weaken its right to First Amendment protection).

[11] The dissemination of protected expression under commercial auspices is of course to be distinguished from the dissemination of "purely commercial" communications such as mercantile advertising—which do not enjoy the First Amendment protection otherwise accorded. (See *Murdock* v. *Pennsylvania, supra* (1943) 319 U.S. 105, 110-111; *Valentine* v. *Chrestensen* (1942) 316 U.S. 52, 55; *New York Times Co.* v. *Sullivan, supra* (1964) 376 U.S. 254, 266.)

be regulated or taxed in a reasonable and nondiscriminatory manner.[12] Thus the antitrust proscriptions of the Sherman Act were held applicable to newspapers, with the comment by the court that "Freedom to publish means freedom for all and not for some," a comment also appropriate in the instant case. (*Associated Press* v. *United States, supra* (1945) 326 U.S. 1, 7, 19–20; see also *Lorain Journal Co.* v. *United States* (1951) 342 U.S. 143.) The Fair Labor Standards Act and the National Labor Relations Act have likewise been applied to the newspaper business. (*Oklahoma Press Pub. Co.* v. *Walling* (1946) 327 U.S. 186, 192–193; *Mabee* v. *White Plains Pub. Co.* (1946) 327 U.S. 178, 184; *Associated Press* v. *Labor Board* (1937) 301 U.S. 103, 130.) In *Kovacs* v. *Cooper, supra* (1949) 336 U.S. 77, an ordinance was sustained which barred sound trucks from broadcasting in a *loud and raucous manner* on the streets.[13]

And in *Breard* v. *City of Alexandria, supra* (1951) 341 U.S. 622, a local ordinance denominating a nuisance and prohibiting door-to-door solicitation of orders for goods, *without previous request* by the occupant of the home, was sustained against First Amendment attack as applied to one selling magazines. By contrast, in *Martin* v. *Struthers, supra* (1943) 319 U.S. 141, an ordinance which made it "unlawful for any person distributing

[12] See *Murdock* v. *Pennsylvania, supra* (1943) 319 U.S. 105, 110; *Gospel Army* v. *City of Los Angeles* (1945) 27 Cal.2d 232, appeal dism. 331 U.S. 543; *City of Corona* v. *Corona etc. Independent* (1953) 115 Cal.App2d 382, 390, cert. den. 346 U.S. 833.

[13] Cf. *Saia* v. *New York, supra* (1948) 334 U.S. 558, striking down as overbroad an ordinance prohibiting the use of sound amplifiers in public places without permission from the chief of police, where no standards were prescribed for the exercise of that official's discretion.

handbills, circulars or other advertisements to ring the door bell, sound the door knocker, or otherwise summon" householders to their door "for the purpose of receiving" such material, was held invalid as applied to one distributing advertisements for a religious meeting. The holdings of *Breard* and *Struthers* are particularly apt in pointing up the infirmity of the Act now before us. That Act attempts, absolutely and completely, to deprive householders of the *right to receive* communications from home subscription television (*Struthers*), whereas under no circumstances does it appear that such communications could intrude into their homes absent their request via a subscription (*Breard*).

Grosjean v. American Press Co., supra (1936) 297 U.S. 233, likewise lends support to the views we have expressed with respect to the Act. In *Grosjean* a statute which imposed a 2 per cent tax upon the gross receipts of newspapers making a "charge" for advertising and having a circulation of over 20,000 copies per week, was held to be an unconstitutional impairment of First Amendment rights. The court reasoned that the statute was "a deliberate and calculated device in the guise of a tax" which had the effect of curtailing revenue and of restricting circulation, and thus of limiting "the circulation of information to which the public is entitled in virtue of the constitutional guaranties." (Pp. 244–245, 250, of 297 U.S.) Further, states the opinion, "It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of

the press. . . . The tax here involved is bad not because it takes money from the pockets of the appellees" but because of its effect of restricting the dissemination of information to the public.[14] The Act before this court in the present case would not only *curtail* revenues, as in *Grosjean*, but would utterly prohibit collecting them from home subscribers; it thus constitutes a complete ban on the establishment of a home subscription television system in California, and, consequently, on the disseminating of speech, ideas, and entertainment over such a system. As already stated, a suppression so sweeping in its scope can be sustained only to prevent a "clear and present danger" that there would otherwise be brought about "substantive evils" against which the state has a right to protect. No such "danger" or "evils" are shown here.

In this connection we note further that the radio and television regulation sustained in *National Broadcasting Co.* v. *U.S.*, *supra* (1943) 319 U.S. 190 (and other cases which followed), upon which defendant relies, was limited to certain rules of the Federal Communications Commission governing the selection of programs—rules whose purpose was to *avoid* practices which would hinder growth of new networks and would deprive the listening public in many areas of service and would deprive local stations of much of their choice of programs. (Pp. 198–209.) The court points out, among other things, that the FCC rules

[14] See also *Sun Pub. Co.* v. *Walling* (6 Cir. 1944) 140 F.2d 445, 449 ("No case has been cited and none has been found . . . which holds that a newspaper may be barred from the channels of commerce as a means of effectuating an administrative regulation, or a court decree enforcing an administrative order."); *City of Baltimore* v. *A. S. Abell Co.* (1958, Md.) 145 A.2d 111, 119.

had been authorized by a Congress fearful that "in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field." (P. 219 of 319 U.S.) We are convinced that the sweeping suppression of home subscription television, as attempted by the Act now before us, would, contrary to the Act's declarations, encourage and foster monopolistic domination by existing television stations deriving their financial support from commercial advertisers. (See fn. 11, *ante*.) Monopoly in the field of communication can best be avoided by permitting the growth of that field of endeavor in directions and through media which will provide the widest possible range and choice of ideas and of expression.

Our conclusion that the Act violates the free speech and press guaranties renders it unnecessary to discuss plaintiffs' further contention that it likewise imposes an arbitrary classification in violation of the equal protection clauses of the federal and state Constitutions.

The judgment is affirmed.

BURKE, J.

WE CONCUR:

TRAYNOR, C. J.
McCOMB, J.
PETERS, J.
TOBRINER, J.
PEEK, J.

DISSENTING OPINION OF MOSK, J. TO OPINION OF BURKE, J.

I dissent.

My learned colleagues have determined that the initiative enactment at hand must fall, and they cite a plethora of First Amendment cases in support of their conclusion. No one can denigrate either the citations or the revered constitutional principles they enunciate. They are indeed irrefutable. If this were a freedom of speech case, the majority opinion would be unassailable, and I would join in it.

As I see it, however, my associates are vanquishing an illusory adversary. The target here is not speech; it is merely a matter of dollars and cents and the power of the people of the state to decide who gets them.

The majority opinion accurately points out that the "chief and crucial difference between presently existing home television in California, and subscription television, is the method of collecting revenues." I find it difficult to make the leap from that crucial difference, the method of collecting revenue—an economic choice purely and simply—to the fundamentals of free speech and to the conspiratorial absolutes of "suppression" and "total censorship" feared by my colleagues. There is a vast chasm between the economic element at hand and the apparition of government censorship. The majority opinion fails to convincingly bridge that gap.

There is nothing in the Act in question which prohibits or restricts in any way the holding, expression,

publication, or dissemination of any opinion, view, idea, thought, or belief. There is no circumscription whatsoever on the content of any communication, oral or written. The Act prohibits only a charge imposed upon persons in their homes to hear or see communications when disseminated by means of coaxial cables or through the airwaves, which Congress has determined to be in the public domain.[1]

The nucleus of the Act is found in its section 3, which asserts that the "public shall have the right to view any television program on a home television set free of charge" and "no person shall, directly or indirectly, make a charge inconsistent with such right." Neither that section, nor any other part of the Act, purports to circumscribe in any manner the content or character of programs, or the manner of communication thereof. The gravamen is the *charge* for serving home television sets.

The First Amendment guarantees freedom of speech; it does not guarantee the right to be paid for exercise of that freedom. Since the Act goes only to the element of compensation, not to the right of expression, the First Amendment is irrelevant in the case at hand.[2] (See Associated Press v. United States (1945) 326 U.S. 1, 20; National Broadcasting Co. v.

[1] On February 15, 1966, the Federal Communications Commission purported to extend its jurisdiction to include regulation of virtually all forms of community antenna television. This portends a future question of federal preemption.

[2] Although a free speech violation was not reached in the majority opinion in United States V. C.I.O. (1948) 335 U.S. 106, the concurring opinion of Justice Rutledge, at page 155, contains this interesting observation on the reverse of the point involved here: "The [First] Amendment did not make its protections turn on whether the hearer or reader pays, or can pay, for the publication or the privilege of hearing the oral or written pronouncement. Neither freedom of speech and the press nor the right of peaceable assembly is restricted to persons who can and do pay."

United States (1943) 319 U.S. 190, 226–227; Lorain Journal Co. v. United States (1951) 342 U.S. 143, 155–156.) Nevertheless, I shall discuss several First Amendment tests that have been and can be applied and, as will be seen, under each of them this enactment fails to offend constitutional sensibilities.

First of all, it appears that the majority finds this Act presumptively unconstitutional, ignoring the well-established rule that a legislative enactment is presumed to be valid and that persons adversely affected must sustain the burden of demonstrating constitutional intrusion.[3] Neither First nor Fourteenth Amendment cases alter the basic principle. As Justice Frankfurter wrote in a concurring opinion in Kovacs v. Cooper (1949) 336 U.S. 77, 94–95: "the claim that any legislation is presumptively unconstitutional which touches the field of the First Amendment and the Fourteenth Amendment, insofar as the latter's concept of 'liberty' contains what is specifically protected by the First, has never commended itself to a majority of this Court."

Justice Douglas has explained the reason "why First Amendment rights are often said to have a preferred position in our constitutional scheme. They are preferred because the Constitution, as construed, protects them against abridgment by either the States or the federal government. Few other provisions of the Bill of Rights have ever been applied in full force to the States." (Douglas, An Almanac of Liberty (1954) p. 123.)

That concept of "preference" is vastly different from the theory of unlimited precedence casually stated in many opinions and articles, and now the

[3] See Harris, *Freedom and the Businessman* (1952) 37 Iowa L. Rev. 196, 200.

basis of considerable academic conflict. Professor Herbert Wechsler has suggested that "the 'preferred position' controversy hardly has a point—indeed, it never has been really clear what is asserted or denied to have preference over what. Certainly the concept is pernicious if it implies that there is any simple, almost mechanistic basis for determining priorities of values having constitutional dimension. . . ." (Wechsler, *Toward Neutral Principles of Constitutional Law* (1959) 73 Harv. L. Rev. 1, 25.)

In addition to denying presumptive unconstitutionality, Justice Frankfurter flatly denied the propriety of a "preferred position" for First Amendment cases in Kovacs v. Cooper (1949) supra, 336 U.S. 77, 90 [concurring opinion]: "This is a phrase," he said somewhat contemptuously, "that has uncritically crept into some recent opinions of this Court. I deem it a mischievous phrase, if it carries the thought, which it may subtly imply, that any law touching communication is infected with presumptive invalidity."[4] Professor Paul A. Freund agrees with Frankfurter. In his book, The Supreme Court of the United States (1961) (at p. 75), he wrote: "Mr. Justice Frankfurter is right in cautioning against the epithet 'preferred position' for those freedoms if the epithet threatens to become a substitute for analysis."

Nevertheless, the majority appear to have invoked a presumption of unconstitutionality, and, having improvidently done so, next resort to the "clear and present danger" test. Here again, I respectfully suggest they have fallen into error.

[4] Frankfurter discussed the issue again in Dennis v. United States (1951) 341 U.S. 494, with reference to "shifting economic arrangements," an expression most apt to describe the conflict here between competing economic methods of communication.

To employ the "clear and present danger" test under these circumstances results in a far too broad interpretation of a time-honored phrase. Professor Freund wrote, in The Supreme Court of the United States, supra (at p. 44): "No matter how rapidly we utter the phrase 'clear and present danger,' or how closely we hyphenate the words, they are not a substitute for the weighing of values. They tend to convey a delusion of certitude when what is most certain is the complexity of the strands in the web of freedoms which the judge must disentangle."

Prevailing authority limits application of the "clear and present danger" rule to those cases involving restriction upon the *content* of speech, and the test is not apposite in situations in which there are "general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise." (Konigsberg v. State Bar (1961) 366 U.S. 36, 50-51; to the same effect see American Communications Ass'n v. Douds (1950) 339 U.S. 382, 396-397; Schenck v. United States (1919) 249 U.S. 47, 52.)

This court has recognized the foregoing distinction. In Katzev v. County of Los Angeles (1959) 52 Cal.2d 360, 366, a clear and present danger test was applied to a county ordinance absolutely prohibiting the sale of comic books consisting of a crime theme to persons under 18 years of age. In subsequent cases, involving regulations and restrictions upon campaigning and political activities by officials, the court adopted a balancing test and eschewed application of either *Katzev* or a clear and present danger. (Canon v. Justice Court (1964) 61 Cal.2d 446; Fort v. Civil Service Commission (1964) 61 Cal.2d 331; Kinnear v. City & County of San Francisco (1964) 61 Cal.2d 341.) The ration-

ale appears clear: in *Katzev* there was interference with content of the publication, whereas in the subsequent cases there was a mere tangential speech interference resulting from other governmental purpose.

Professor Thomas I. Emerson noted that same distinction in his formidable critique of First Amendment problems in 72 Yale L. J. (1963) 877. The clear and present danger doctrine "grew out of cases where the restriction at issue was a direct prohibition of expression by criminal or similar sanctions, and is of doubtful application to other kinds of interference with freedom of expression. . . . And where the regulation in question is not aimed directly at punishing a particular utterance but affects freedom of expression in a more generalized or indirect way, as in a tax law or a disclosure requirement, the issues are not framed in terms of whether a specific utterance creates a specific danger. In any event, the clear and present danger test has not been applied in such cases." (*Id.* at p. 911.)

We next come to application of one phase of the "balancing test." A First Amendment absolutist like Mr. Justice Black has conceded the present ascendancy of the so-called balancing test (e.g., his dissenting opinions in Barenblatt v. United States (1959) 360 U.S. 109, 140–144; El Paso v. Simmons (1965) 379 U.S. 497, 517, and Scales v. United States (1961) 367 U.S. 203, 259). He appears to agree with the "cases suggesting that a law which primarily regulates conduct but which might also indirectly affect speech can be upheld if the effect on speech is minor in relation to the need for control of the conduct." (Barenblatt v. United States, supra, at p. 141.)

Under the balancing test it is no longer sufficient to establish a violation of the First Amendment by

merely showing there has been some limitation on speech. (American Civil Liberties Union v. Board of Education (1963) 59 Cal.2d 203, 210–211.) If there is a reasonable legislative basis for the limitation, constitutional rights have not been denied. Alleged impairments of First Amendment rights are "balanced" by determining whether there is a reasonable relationship between the impairment and a subject of overriding and compelling state interest. (Canon v. Justice Court (1964) supra, 61 Cal.2d 446, 456.)

The ad hoc balancing theory originated in 1939 in Schneider v. State, 308 U.S. 147, and reached its ultimate definition in Chief Justice Vinson's opinion for the majority in American Communications Ass'n v. Douds (1950) 339 U.S. 382, in which, at page 399, he wrote: "When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented."

A contention similar to that made by these respondents was argued in Estes v. Texas (1965) 381 U.S. 532, in which television broadcasters maintained that there was an abridgment of the right of free press because they were prohibited from using television cameras during the course of a trial. A divided court held upon balancing the alternatives that there was no abridgment of the right of free press, and that the court in its discretion could determine that decorum necessitated exclusion of television broadcasters. Similarly, a recent rule adopted by the Judicial Council of California under the chairmanship of the Chief Justice bars photographers and cameramen from courtrooms solely in the interest of proper adminis-

tration of justice. There is no imposition upon the free right of communication in such rule, even though it is prohibitory and not merely regulatory.

The Act involved here may be compared with statutes (Ed. Code, §§ 16561 et seq.) which permit use of public school buildings upon such terms and conditions as the governing school board deems proper. Many school boards refuse to permit admission charges for noneducational events, and others decline to authorize solicitation of funds by political or social users of school property. Education Code section 16562 requires a rental charge for "entertainments or meetings where admission fees are charged or contributions" sought for nonschool purposes. These economic restrictions have never been interpreted as being a limitation upon the exercise of free speech. Certainly it is plain to see that a valid distinction exists in a schoolhouse between speech free to all listeners and speech available only for a monetary consideration. Equally arguable is a basic distinction between communications to the home without charge and communications to the home only upon payment of a fee. The key in each instance is not speech, nor the content thereof, but the economic factor.

The First Amendment does not exempt commercial enterprises, even though they be publishers or broadcasters, from regulation or prohibition in the manner to which other businesses may be subjected. "As the press has business aspects, it has no special immunity from laws applicable to business in general." (Mabee v. White Plains Pub. Co. (1946) 327 U.S. 178, 184; see also Oklahoma Press Pub. Co. v. Walling (1946) 327 U.S. 186, 192-193.)

It is clear that broadcasting licenses may be denied, despite a First Amendment plea, if the company's past business practices were monopolistic in character (Mansfield Journal Co. v. Federal Commun. Com'n (D.C. Cir. 1949) supra, 180 F.2d 28, 35), if the broadcaster made misrepresentations in his application for a license (Independent Broadcasting Co. v. Federal Commun. Com'n (D.C. Cir. 1951) 193 F.2d 900), or if the broadcaster violates standards prescribed by the Federal Communications Commission (National Broadcasting Co. v. United States (1943) supra, 319 U.S. 190, 226-227). The federal government has been held to have power to restrain broadcasting of false advertising without any question of abridgment of free speech. (E.F. Drew & Co. v. Federal Trade Com'n (2d Cir. 1956) 235 F.2d 735, 739-740; American Medicinal Products v. Federal Trade Com'n (9th Cir. 1943) 136 F.2d 426, 427.)

These and numerous other decisions make it abundantly clear that the exercise of the police or similar governmental power to regulate business in the public interest is not precluded by the fact that the business activity is claimed to be generally within the protection of the First Amendment.

Laurent B. Frantz, in his article, *The First Amendment in the Balance* (1962) 71 Yale L. J. 1424, 1429, notes that the balancing test, according to *Schneider,* "should apply only to regulations of the time, place and manner of speaking which, though neutral as to the content of speech, may unduly limit the means otherwise available for communicating ideas to the public. As reformulated in *Douds,* it should apply only when the statute is construed as regulating conduct, and where the

effect on speech is deemed both relatively minor and a mere incidental by-product of the conduct regulation."

In applying a balancing to the instant case, we find on one side of the scale that free speech and its contents are unaffected; on the other side, commercial exploitation of speech in the sanctity of the home is prohibited in the public interest. In that balancing of values, no constitutional infirmity appears.

The majority declare that "Inasmuch as the rights of free speech and press are worthless without an effective means of expression, the guaranty extends to both the content of the communication and the means employed for its dissemination," citing Wollam v. City of Palm Springs (1963) 59 Cal.2d 276, 284, Kovacs v. Cooper (1949) supra, 336 U.S. 77, and Saia v. New York (1948) 334 U.S. 558. But *Wollam* is also authority for the proposition (at p. 284) that "the selection of the means of communication and the use of such means is not limitless. The municipality may issue reasonable and necessary regulations as to such matters." *Saia* is not apposite, for there the ordinance gave unrestricted discretion to a chief of police to control dissemination of information. *Kovacs,* on the other hand, prohibited dissemination of ideas through loud sound trucks on public streets; this was held to be permissible. That the result was prohibition of speech instead of mere regulation was of little moment, said the court, for "All regulatory enactments are prohibitory so far as their restrictions are concerned, and the prohibition of this ordinance as to a use of streets is merely regulatory." (336 U.S. at p. 85.) (Also see Breard v. Alexandria (1951) 341

U.S. 622, 641, in which it was noted that "Regulation necessarily has elements of prohibition.")

Kovacs held that sound trucks could "be utilized in places such as parks or other open spaces off the streets" but not on public streets. It was contended that this amounted to a drastic curtailment of speech rights in a significant area, the streets of a city. The court held that this did not constitute "restriction upon the communication of ideas or discussion of issues. . . ." Similarly, in the instant case, the Act prohibits *charges* for television programs transmitted into the home; it does not prohibit transmitting the programs into the home nor charging for the programs in places other than the home. A distinction between the home and other places for economic purposes seems no more tenuous than the *Kovacs* distinction between public streets and public parks for use of loud sound trucks. Whether a persuasive basis exists for the classification reposes here, as it did in *Kovacs,* with the legislative process.

We next consider the enactment under the doctrine of economic due process,[5] even though since 1937, the Supreme Court of the United States has consistently repudiated the concept, perhaps somewhat restively of late. Professor Robert G. McCloskey suggests after exhumation of the doctrine that it should rest in peace. (McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial.* The Supreme Court Review (1962) pp. 34 et seq.) After Ribnik v. McBride (1928) 277 U.S. 350, proclaimed

[5] "Few legal doctrines have been subjected to more bitter criticism than this testing of regulatory legislation by the due process clause," Professor Monrad Paulsen wrote in *The Persistence of Substantive Due Process in the States* (1950) 34 Minn. L. Rev. 91. He concluded that the invalidation by reason of the due process clause of state laws seems "to be a matter of history."

its restrictions over "business affected with a public interest," the theory was totally repudiated by Justice Douglas, for a unanimous court, in Olsen v. Nebraska (1941) 313 U.S. 236. There is no requirement, he said, that the State make out a case for the appropriateness of the law. "Differences of opinion on that score suggest a choice which 'should be left where . . . it was left by the Constitution—to the states and to Congress.'" (*Id.* at p. 246.) Following *Olsen*, the court made its views pellucid in several other decisions, notably Day-Brite Lighting, Inc. v. Missouri (1952) 342 U.S. 421—in which it was said whether legislation "offends the public welfare" is not the business of the court—and Williamson v. Lee Optical Co. (1955) 348 U.S. 483, in which it was noted that debatable issues as respects business, economic and social affairs were for legislative decision.[6] (Also see United States v. Carolene Products Co. (1938) 304 U.S. 144, 154;[7] Carpenter, *Economic Due Process and the State Courts* (1959) 45 A.B.A.J. 1027.)

The result of this virtual abdication of the economic field by the judiciary has been, noted Justice Holmes in Tyson & Brother v. Banton (1927) 273 U.S. 418,

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[6] Mr. Justice Douglas opened his opinion in Williamson v. Lee Optical Co. (1955) 348 U.S. 483, 488, with these words: "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."

[7] Chief Justice Stone wrote in *Carolene* (at p. 154) that "Regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assmption that it rests upon some rational basis within the knowledge and experience of the legislators."

For a discussion of Stone's controversial footnote 4 in *Carolene*, see Mason, Harlan Fiske Stone (1956), pp. 511-515.

446 [dissenting opinion], "that, subject to compensation when compensation is due, the legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it." This, concludes Professor McCloskey in his article in The Supreme Court Review, supra, page 41, "is the *de facto* policy of the modern Court." In the case at hand, we have a rare instance in which the force of public opinion is precisely and numerically demonstrable.

Mr. Chief Justice (then Justice) Traynor, in his dissent in State Board v. Thrift-D-Lux Cleaners (1953) 40 Cal.2d 436, 449–450, discussed legislative power in the broad field of economics in this manner: "The Legislature has power to determine the rights of persons, subject only to the limitations of the United States Constitution and the California Constitution. [Citations.] A statute regulating commercial transactions does not violate the due process clause of either Constitution unless it is proved so unreasonable as to dispel the presumption that it rests upon some rational basis within the knowledge and experience of the legislators. [Citations.] Judicial inquiry 'where the legislative judgment is drawn into question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it.' [Citation.] The statute in the present case, like any other regulation of private enterprise, must be considered in this light." Justice Traynor then discussed progression from early decisions holding regulation limited to industries "clothed with a public interest (see Ribnik v. McBride, 277 U.S. 350 [48 S.Ct. 454, 72 L.Ed. 913]) [and found] the United States Supreme Court discarded that test in Nebbia v. New York, 291 U.S. 502, 531–539 [54 S.Ct. 505, 78 L.Ed. 940]. (See, also, West

Coast Hotel Co. v. Parrish, 300 U.S. 379 [57 S.Ct. 578, 81 L.Ed. 703, 108 A.L.R. 1330].) In Olsen v. Nebraska, 313 U.S. 236, 244 [61 S.Ct. 862, 85 L.Ed. 1305, 133 A.L.R. 1500], the court in a unanimous opinion overruled the Ribnik case and refused to inquire into the wisdom of the challenged legislation. . . . This court soon followed the lead of the United States Supreme Court. (Wholesale Tobacco Dealers Bureau v. National Candy & Tobacco Co., supra, 11 Cal.2d 634, 655.)" (On this phase of economic regulation, see Notes in (1954) 39 Cornell L.Q. 561, 578–579; (1953) 2 Jour. Pub. Law 98; (1952) 37 Iowa L. Rev. 196.)

In a long series of cases involving state legislative incursions into economic liberty, the Supreme Court has evolved a formula that the due process clause prohibits state restrictions on individual freedom only if they are capricious, arbitrary and without foundation in reason. As will be seen hereinafter, I do not believe the restrictions here are of that character. To promote public health, safety, morals and welfare, the state must have power to impose restrictions on the activities of individuals which reasonably relate to these legitimate objectives of legislation. It must have a reasonable latitude for action to cure or mitigate social and economic evils. And it is clear that if the court finds that the legislative judgment is within the area in which reasonable men might differ, the law is to be upheld. (Harper, Justice Rutledge and the Bright Constellation (1965) pp. 97-98.)

Having previously applied the "balancing test" to ascertain if freedom of speech was invalidly hampered and having reached a negative conclusion, we now approach a second phase of balancing to determine whether the economic regulation is reasonable and

thus justifies whatever incidental intrusion upon the rights of these plaintiffs may ensue.

Taking all the factors of balancing into account, it is clear that maintaining a system of freedom of expression is one of the most complex problems any society has to face. Self-restraint, self-discipline and maturity are required. The theory is essentially highly sophisticated. Members of the society must be willing on occasions to sacrifice individual and short-term advantage for social and long-range goals. And the process necessarily operates in a context that is charged with emotion and subject to powerful conflicting forces of self-interest. (Emerson, *Toward a General Theory of the First Amendment* (1963) 72 Yale L. J. 877, 889.)

Adjustment of rights is a meaningful concept. For it must be apparent that the attainment of freedom of expression is not the sole aim of society. Professor Emerson has written that "as the private right of the individual, freedom of expression is an end in itself, but it is not the only end of man as an individual. In its social and political aspects, freedom of expression is primarily a process or a method for reaching other goals. It is a basic element in the democratic way of life, and as a vital process it shapes and determines the ends of democratic society. But it is not through this process alone that a democratic society will attain its ultimate ends. Any theory of freedom of expression must therefore take into account other values, such as public order, justice, equality and moral progress, and the need for substantive measures designed to promote those ideals. Hence there is a real problem of reconciling freedom of expression with the other values and objectives sought by the good society." (72 Yale L. J., supra, at p. 907.)

Chief Justice Stone once wrote: "There must be reasonable accommodation between the competing demands of freedom of speech and religion on the one hand, and other interests of society which have some claims upon legislative protection. To maintain the balance between them is essential to the well-ordered functioning of government under a constitution. Neither is absolute, and neither can constitutionally be made the implement for the destruction of the other." (Letter to Justice Rutledge, Jan. 23, 1944, quoted in Mason, Harlan Fiske Stone (1956) p. 535.)

Freedom of speech is not a portmanteau phrase, a contraction of expression and action. Therefore, in attempting to formulate a workable legal doctrine which will take into account the basic factors underlying our system of freedom of expression and which will give effect to the fundamental decision embodied in the First Amendment for reconciling freedom of expression with other social values and objectives, we must distinguish between "expression" and "action." (Emerson, *Toward a General Theory of the First Amendment* (1963) 72 Yale L. J. 877 et seq.) The line in many situations is clear, but in some contexts it becomes obscure. Nevertheless, finding the line becomes necessary, for all available authorities hold that while expression must be given protection, action is subject to regulation. In borderline cases "the determination of whether the conduct is to be treated as expression or action rests upon whether the harm is immediate, whether it is irremediable, and whether regulation of the conduct is administratively consistent with maintaining a system of freedom of expression." (*Id.* at p. 917, fn. 47.)

What we have here is regulation of action, the act of televising to homes and charging monetary consideration therefor; we do not have an inhibition of expression, its mode or content. Thus the Act meets Emerson's test of being administratively consistent with maintaining a system of freedom of expression.

Justice Jackson's concurring opinion in Thomas v. Collins (1945) 323 U.S. 516, 545, makes a significant contribution to understanding the distinction between freedom of speech and communication for hire. The "wider range of power over pursuit of a calling than over speech-making," he wrote, after giving a number of illustrations, "is due to the different effects which the two have on interests which the State is empowered to protect. The modern state owes and attempts to perform a duty to protect the public from those who seek for one purpose or another to obtain its money." To the same effect, see the rule discussed in Cantwell v. Connecticut (1940) 310 U.S. 296, 305, that the "general regulation, in the public interest, of solicitation . . . is not open to any constitutional objection, even though the collection be for a religious purpose. Such regulation woud not constitute a prohibited previous restraint on the free exercise of religion or interpose an inadmissible obstacle to its exercise." See also Prince v. Massachusetts (1944) 321 U.S. 158, in which a prohibition against street solicitation by children was held not to be an unconstitutional interference with freedom of religion. To the same effect is Gospel Army v. City of Los Angeles (1945) 27 Cal.2d 232.

Breard v. Alexandria (1951) supra, 341 U.S. 622, 644, presents a factual situation not dissimilar to the instant case. Breard had a crew of courteous solicitors

who sought to sell magazines from door to door contrary to a local prohibitory ordinance. The constitutionality turned upon "a balancing of the conveniences between some householders' desire for privacy and the publisher's right to distribute publications in the precise way that those soliciting for him thinks brings the best results." After weighing the conflict the court concluded (at p. 645) that it would be "a misuse of the great guarantees of free speech and free press to use those guarantees to force a community to admit the solicitors of publications to the home premises of its residents." It would appear to be no less a misuse of free speech to compel the State of California, contrary to the expressed desire of a majority of its citizens, to admit television for hire into homes. It is no answer to say those who do not desire pay television may refuse it; the people of Alexandria were not compelled to see solicitors or to subscribe to Breard's magazines. As the court there held (at p. 642), "The First and Fourteenth Amendments have never been treated as absolutes. Freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses. Rights other than those of the advocates are involved. By adjustment of rights, we can have both full liberty of expression and an orderly life." The key in *Breard* was, as it is in the instant case, the commercial aspect of the communications.

Remarkably apposite to our problem is Valentine v. Chrestensen (1941) 316 U.S. 52. A municipal ordinance forbade distribution in the streets or other public places of handbills containing commercial matter. The alleged offender circulated handbills with personal polemics on one side and a commercial mes-

sage on verso. The ordinance was upheld, and Justice Roberts, for a unanimous court made the distinction between valid and impermissible prohibition crystal clear (at p. 54): "This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. *We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.* Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment." (Italics added.) There is no rational explanation for the ability of society to prohibit commercialism in the streets but to be impotent when it desires to control commercial invasion of homes.

It may well be that the Act in question here is, in the words of Justice Stewart in Griswold v. Connecticut (1965) 381 U.S. 479, 527 [dissenting opinion], "an uncommonly silly law." But the role of the judiciary is not to substitute its view of propriety for that of the legislative process, as long as the court finds no constitutional inhibition violated. Justice Black, also in *Griswold,* expressed his frequent doubt that the court should "sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of the Court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational. The adoption of such a loose,

flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts and worse for the country." (At p. 521.)

We must not be oblivious to the admonition of Justice Frankfurter in Dennis v. United States (1951) supra, 341 U.S. 494, 539–540 [concurring opinion], that "direct policy-making is not our province. How best to reconcile competing interests is the business of legislatures, and the balance they strike is a judgment not to be displaced by ours, but to be respected unless outside the pale of fair judgment." And again, in *Dennis,* he said, "We are to set aside the judgment of those whose duty it is to legislate only if there is no reasonable basis for it."

In our process of balancing competitive economic interests, we now reach the question whether "there is no reasonable basis" for this Act and it is "outside the pale of fair judgment" and whether the plaintiffs who challenge the statute's validity have in their pleadings—since no testimony was taken and the matter was decided on the pleadings—shown that it is "palpably arbitrary and beyond rational doubt erroneous." (State of California v. Ind.Acc.Com. (1957) 48 Cal.2d 365, 371.)

Contentions of the defendant and amici curiae may be reduced to the following syllogism:

a. the free television industry bears a demonstrable relationship to public welfare, convenience, morals, health and economy, and therefore should be protected by government in the public interest;

b. pay television threatens impairment of the benefits of free television presently enjoyed by the public;

c. to preserve the asset of free television, the public through its legislative process may take such steps as are necessary to thwart impairment by pay television.

The major or minor premise of the syllogism may be weak or debatable, but this would hardly be unprecedented in the legislative arena. A disputatious posture does not justify finding as a matter of law that the logic is captious or the conclusions capricious or arbitrary.[8] Indeed, the foregoing theme, in one form or another, was advanced both in congressional and legislative hearings and in the persuasive argument made to the voters at the time this Act was adopted. Whether the contentions are wholly sound or factual, if there be a reasonable legislative belief in their support, under the balancing test the state's police power unquestionably permits prohibition of an activity or business that may reasonably be thought to threaten destruction or impairment of some other activity or business deemed by the state's legislative power to be important to the public welfare, health, morals, economy, or convenience. (Miller v. Schoene (1928) 276 U.S. 272, 279.)[9]

[8] See Chafee, Free Speech in the United States (1942) p. 406, in which the author discusses at some length the bases for immunizing the home from commercial intrusion. He found a new right which he labeled "freedom of the home."

[9] The *Miller* case bears a striking analogy to the instant case. Apple growing was one of the principal agricultural pursuits in West Virginia. The red cedar was idigenous to the state and was the subject of a small lumber industry. The trees, however, harbored a parasite that was harmful to apple trees. A statute that required all red cedar trees in the state to be destroyed, thus clearly favoring one industry over another, was held constitutional.

The foregoing, as a desired end, is perfectly proper. It might be said that other and less drastic means might be found to accomplish the purpose of protecting free television and avoiding commercial exploitation in the home, that the Act here results in throwing out the baby with the bath water. Perhaps other devices could be suggested and other alternatives adopted. But in the area of economic regulation, if the ends are valid, and the means are related to the ends, the legislative process may select from among the appropriate means. The enactment in question represents the selectivity of the people of the state in the exercise of their legislative power. It is not the judicial function to second-guess the legislative choice of alternatives.

Justice Holmes put it this way in Lochner v. New York (1905) 198 U.S. 45, 75-76 [dissenting opinion]: "Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state, or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."

Perhaps the most appropriate peroration is found in the words of Chief Justice Traynor in his dissent in State Board v. Thrift-D-Lux Cleaners, supra, at page 458 of 40 Cal.2d: "The real basis for the result reached by the majority opinion is an adherence to an economic view that [the regulatory] legislation is not

in the best interests of the general public. But as Mr. Justice Holmes long admonished, the economic and moral beliefs of the judiciary are not embedded in the Constitution. There is no reason to suppose that judges are better qualified than legislators to determine what social and economic programs should be adopted by the State of California." In this instance, substitute for "legislators," the words "the sovereign people."

I would reverse the judgment.

MOSK, J.

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SACRAMENTO

S. L. WEAVER, D. E. O'NEIL and S. T. GREENHOW,
Plaintiffs,

vs.

FRANK M. JORDAN, as Secretary of State of the State of California,
Defendant.

No. 155760
Memorandum Opinion

I

At the general election held in this State on November 3, 1964, there was adopted an initiative measure designated on the ballot as "Proposition 15". The Free Television Act (hereinafter referred to as the "Act") so adopted makes unlawful, *inter alia,* the use, transmission and reception of subscription television. On December 9, 1964, plaintiffs submitted articles of incorporation to defendant Secretary of State for the purpose of creating a corporation to engage in the subscription television business within California. The Secretary refused to file the articles because the proposed activity of the corporation would be unlawful under the Act. Plaintiffs thereupon filed an action for declaratory relief contending that the Act is violative of the United States and California Constitutions.

After defendant Secretary of State answered, he filed a motion for judgment on the pleadings and plaintiffs filed a motion for summary judgment. These motions are now presented to the Court for its consideration.

II

The great constitutional issue here presented involves freedom of speech. This basic right, guaranteed by the First Amendment, has long been held to be incorporated in the Fourteenth Amendment due process clause, thus protecting against state abuse. In *Near* v. *Minnesota* (1931) 283 U.S. 697, 707, the Supreme Court said:

> "... liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action."[1]

Since the right is worthless without an effective means of expression, the guarantee extends to both the content of the communication and the means employed for its dissemination (*Kovacs* v. *Cooper* (1949) 336 U. S. 77; *Saia* v. *New York* (1948) 334 U. S. 558; *Wollam* v. *City of Palm Springs* (1963) 59 Cal. 2d 276). Radio (*Baltimore Radio Show, Inc.* v. *State* (1948) 193 Md. 300, 323, 67 A 2d 497, 507, *cert. den.* (1949) 338 U. S. 912), television (*American Broadcasting Company* v. *United States* (S.D.N.Y., 1953) 110 F. Supp. 374, 389, *aff'd sub nom. F.C.C.* v. *American Broadcasting Company* (1954) 347 U. S. 284) and motion pictures (*Joseph Burstyn, Inc.* v. *Wilson* (1952) 343 U. S. 495, 502) come within this protection.

[1] Liberty of speech also is guaranteed by section 9, Article I of the California Constitution.

Nor does the fact that a majority of the voters cast their ballots in favor of Proposition 15 remove it from scrutiny in the light of constitutional protections. It was said in *West Virginia State Board of Education* v. *Burnette* (1943 319 U. S. 624, 638–639:

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. *One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.*" (Emphasis supplied)

III

We, then, must ascertain the standards which have been applied by the Supreme Court with respect to freedom of expression.

The earlier stages of the interpretation of the First Amendment saw the ennunciation of the so-called "bad tendency" test. In *Gitlow* v. *New York* (1925) 268 U. S. 652, 667, 669, the Supreme Court said:

> "That a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public morals, incite to crime, or disturb the public peace, is not open to question."

Thus, a legislature could ". . . extinguish the spark without waiting until it has enkindled the flame or blazed into conflagration."

This test has now been abandoned for it was urged by the government in *Dennis* v. *United States* (1951) 341 U. S. 494, 507, but was rejected by the Court.

The "clear and present danger" test also has been utilized by the Court. Mr. Justice Holmes first stated the doctrine in *Schenk* v. *United States* (1919) 249 U. S. 47, 52, as follows:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

The test was used extensively by the Court (see Mc Kay, *The Preference for Freedom* (1959) 34 N.Y.U.L. Rev. 1182, 1203–1212) until its decisions in *American Communications Association* v. *Douds* (1950) 339 U. S. 382, and *Dennis* v. *United States* (1951) 341 U. S. 494, 510, where the Court seems to have adopted an *ad hoc* balancing test.[2]

Accordingly, the factors that must be considered in the application of the *ad hoc* balancing test are the gravity of the "evil" discounted by its "improbability" (*Dennis* v. *United States, supra;* see Frantz, *The First Amendment in the Balance* (1962) 71 Yale L. J. 1443–1444; Emerson, *Toward a General Theory of the First Amendment* (1963) 72 Yale L. J. 877, 912).

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[2] The "clear and present danger" test may still retain vitality for the Supreme Court of California refers to it as well as to the *ad hoc* balancing test in *Katzev* v. *County of Los Angeles* (1959) 52 Cal. 2d 360, 366. (See Antieau, *Clear and Present Danger—Its Meaning and Significance* (1950) 25 Notre Dame Law. 603, 639-45; Corwin, *Bowing Out, Clear and Present Danger* (1952) 27 Notre Dame Law. 352)

IV

Let us now endeavor to apply the standards established by the Court.

We first consider the sanguine assertion that the Act does not inhibit subscription television—it merely requires that no charge be made for it. This is comparable to asserting that no prohibition of expression would exist in the case of newspapers or motion pictures if a statute were adopted requiring their distribution or showing without charge.

Nor does the Act merely regulate a business in a reasonable, nondiscriminatory manner as is, of course, proper even with a media of expression. Thus, for example, the Fair Labor Standards Act and the National Labor Relations Act have been applied to newspapers (*Oklahoma Press Publishing Company v. Walling* (1946) 327 U. S. 186; *Associated Press* v. *N. L. R. B.* (1937) 301 U. S. 103).

In reality, the Act establishes a prohibition which, as we have seen, will be valid only in terms of the gravity of the "evil" discounted by its "improbability."

The difficulty with the position of defendant and *amicus curiae* in support of defendant is that the "evil" with which they are concerned is speculative and illusory. The Court has read with care the Report of Hearings on Subscription Television, 85th Congress, 2d Session, and it is able to discern only the conjecture from certain viewpoints (some of which are not entirely unbiased) that subscription television *may* destroy free television operation. Others have felt that lacking experience from actual operations of subscription television, the extent and requirement of legislation can not be determined. (*Report of the Assembly*

Interim Committee on Public Utilities and Corporations Relative to Pay Television Assembly Interim Committee Reports 1959–1961, Vol. 17, No. 7.)

Moreover, the recitals of the Free Television Act itself are less than helpful in this regard. It is charged that pay television would have an "adverse effect" on presently licensed stations which make no charge. It would "tend" to deprive viewers of "freedom of choice" and would "tend" to create a monopoly. (Section 2) Even in the Act itself, accordingly, the "evils" are well discounted by "improbability".

In the final analysis it would appear that the charges here made could have been made by the radio industry when television was made available for the home, and by the producers of silent pictures on that memorable day when Al Jolson appeared on the motion picture screen and sang in "The Jazz Singer". Invention and progress may not and should not be so restricted at least when they are cloaked with the immunity of the fundamental freedoms.

The court concludes that the Free Television Act abridges freedom of speech contrary to the guarantees of the First and Fourteenth Amendments to the Constitution of the United States and of section 9 of Article I of the Constitution of California.[3]

[3] This conclusion renders unnecessary the consideration of plaintiffs' "due process", "equal protection" and "faulty title" arguments. It should be noted, however, that the Court has serious reservations as to the validity of these arguments. It is primarily a legislative and not a judicial function to declare economic policy and the Court would be reluctant to invoke economic due process to declare legislation unconstitutional. (See *Allied Properties* v. *Department of Alcoholic Beverage Control* (1959) 53 Cal. 2d 141; *Doyle* v. *Board of Barber Examiners* (1963) 219 Cal. App. 2d 504) Moreover, the classification by the legislature for equal protection purposes will not be overthrown unless palpably arbitrary and erroneous beyond rational doubt. (See

Plaintiffs' motion for summary judgment, accordingly is granted. Defendants motion for judgment on the pleadings is denied. Plaintiffs will prepare appropriate orders and a proposed judgment for the Court's signature.

Subsequent Injuries Fund v. *Industrial Accident Commission* (1957) 48 Cal. 2d 365, 371; but *cf. Department of Mental Hygiene* v. *Kirchner* (1964) 60 Cal. 2d 722-723, (1965) 62 A. C. 613.) Finally, the title of the Act appears adequate in that it clearly "... contain(ed)' a reasonable intimation of the matters under legislative consideration". (*Metropolitan Water District* v. *Marquardt* (1963) 59 Cal. 2d 159, 173-174)

IRVING H. PERLUSS
Judge of the Superior Court

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IN THE

Supreme Court of the United States

October Term, 1965

No. ~~1870~~ 188

FRANK M. JORDAN, etc.,

Petitioner,

vs.

S. L. WEAVER, *et al.*,

Respondents.

Brief of Fox West Coast Theatres Corporation as Amicus Curiae in Support of Petition for Certiorari.

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IN THE

Supreme Court of the United States

October Term, 1965
No. 1370

FRANK M. JORDAN, etc.,

Petitioner,

vs.

S. L. WEAVER, *et al.*,

Respondents.

Brief of Fox West Coast Theatres Corporation as Amicus Curiae in Support of Petition for Certiorari.

Interest of Amicus Curiae.

Fox West Coast Theatres Corporation appeared, with leave of the respective courts, in the trial court and in the Supreme Court of the State of California, as an *amicus curiae* in behalf of the Secretary of State of the State of California, the petitioner here. *Amicus* is engaged in the business of operating, in the State of California, a considerable number of theatres in which entertainment or dramatic motion pictures, and as well, on various but separate and irregularly scheduled times, occasional closed-circuit telecasts of some sporting event, are exhibited to audiences drawn from the public at large. A fee is charged for admission to its theatres for the purpose of viewing, as the case may be, the motion pictures or the closed-circuit telecasts there

exhibited. The statute here involved declares the right of the public "to view any television on a home television set free of charge . . ." and thereby excludes the type of business carried on by *amicus* from its proscription. *Amicus*, therefore, has a direct interest in maintaining the constitutional validity of the statute.

Question Involved.

A state statute, in aid of preserving for the public the free, informational, educational and entertaining programs receivable without cost to the viewer on home television sets, prohibits the making of a charge for the privilege of so viewing television programs, but does not restrict in any way the programs themselves or the right to engage in the broadcasting of television programs. Does such a statute deny the freedom of press and speech secured by the First as incorporated into the Fourteenth Amendment, to a corporation desiring to exact a charge of viewers for receiving its telecasts on home sets?[1]

Reasons for Granting the Writ of Certiorari.

This case presents an important question involving the necessity of reconciling government's power of regulation over business with the constitutional guaranty of free speech and press. That question was decided below in a way that runs counter to the current of authority set in motion by this Court, and that restricts unduly the legislative power in the field of economic legislation. The specific grounds upon which this conclusion is based are set out immediately next.

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[1]The statute involved is reproduced in its entirety in footnote 1 of the opinion of the State Supreme Court. [See 64 Adv. Cal. 243, 246, 411 P. 2d 289, 291, 49 Cal. Rptr. 537, 538.]

1. Incidental or Indirect Effects Upon a Press Medium as the Consequence of Regulation of the Commercial Activities of the Medium Do Not Subordinate Government's Power of Regulation to the Guaranty of Free Press.

At the base of the decision below is the notion that the free Television Act effects a total prohibition of the right of respondents to engage in the television broadcast business and thus abridges their freedom of press and speech. That view of the matter ignores the vital distinction between the fulfillment of one's self by speaking, writing or publishing one's thoughts and the business of selling expression as a commodity. The right to speak, write or publish ordinarily is secured beyond the reach of direct regulation; but not necessarily from the incidental or indirect effects of legislation otherwise motivated.[2] [See, *Konigsberg v. State Bar*, 366

[2]The classic expression of the idea that freedom of speech and press is not absolute is, of course, the often-quoted comment of Holmes, J., writing for the Court in *Schenck v. United States*, 249 U.S. 47, 52, that the "most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic . . ." Applications of that idea to less dramatic facts are readily found in the cases, such as, for example: *Lorain Journal Co. v. United States*, 342 U.S. 143, 153-156 (enjoining publication of advertisements that are part of an attempt to monopolize interstate trade); *Hughes v. Superior Court*, 339 U.S. 460, 465-466 (picketing for an unlawful objective or conducted in an unlawful way); *E. F. Drew Co. v. Federal Trade Com.*, 2 Cir., 235 F. 2d 735, 739-740, *cert. den.* 352 U.S. 969 (cease and desist order against false advertising). [See also, note 11, *infra.*]

This dichotomy between speech and business is well illustrated by contrasting the result in *Valentine v. Chrestensen*, 316 U.S. 52, 54, in which a "purely commercial" advertisement was held not beyond the regulatory power of a State, with the opposite result in *New York Times v. Sullivan*, 376 U.S. 254, 265-266, in which there was involved an advertisement that "communicated information, expressed opinions, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest interest and concern . . ."

U.S. 36, 50-51, and cases there cited.] But the right to engage in business—any business—is not secured beyond the regulatory power of government.[3] The mere fact, therefore, that regulation of a business may have some incidental effect on speech does not perforce bring the First Amendment into play to nullify the economically motivated legislation. The commercial dissemination of speech is a business, and as such is not made immune by the First Amendment from the kind of regulation to which business generally may be subjected. [See, the cases cited, notes 2, 5 and 11, *supra.*] Nor does the Amendment forbid economic regulation merely because an incidental or indirect effect of such regulation is some limitation of the otherwise "unfettered exercise" of the right of free speech or press. [See, *Konigsberg v. State Bar, supra,* 366 U.S., at 50-51, and the cases there cited.] And that is especially so when, as here, the regulation "ends in no restraint upon expression . . ." [*Oklahoma Press Pub. Co. v. Walling,* 327 U.S. 186, 193.[4]]

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[3]Since the end of the "Lochner-Coppage-Adkins" era [see *Olsen v. Nebraska,* 313 U.S. 236, 245] government's power to subject business to regulation in the public interest, including, when deemed desirable, complete prohibition, cannot be doubted. [See, *e.g., Ferguson v. Skrupa,* 372 U.S. 726; *Daniel v. Family Secur. L. Ins. Co.,* 336 U.S. 220; *Breard v. Alexandria,* 341 U.S. 622, 633; *Day-Brite Lighting Co. v. Missouri,* 342 U.S. 421. 425.]

[4]The regulation complained of in this case was the application to a newspaper publisher of the Fair Labor Standards Act. It is, therefore, significant that commodities produced in violation of the wage and overtime standards prescribed by that Act are *excluded entirely* from interstate commerce. [29 U.S.C.A., sec. 215(a)(1).] No question in *Oklahoma Press,* however, was "presented whether Congress could enforce its mandate by excluding from commerce the circulation of a publisher refusing to conform . . ." [327 U.S. at 193(n.8).]

Typical of the current of authority on this subject is *National Broadcasting Co. v. United States,* 319 U.S. 190, 226-227, in which one of the questions was whether the First Amendment prohibited FCC regulations that set standards, compliance with which was a condition to a broadcasting license. Those standards dealt with practices deemed by the Commission to be detrimental to the public interest and necessarily imposed restrictions on the broadcaster's freedom of expression, for they went to such matters as the broadcaster's choice of the nature, tenor and content of the programs he desired to broadcast. This Court, speaking through Mr. Justice Black, rejected the contention that the First Amendment was applicable. It said:

> ". . . The Regulations . . . abridge, say the appellants, their right of free speech. If that be so, it would follow that every person whose application for a license to operate a station is denied by the Commission is thereby denied his constitutional right of free speech. . . . The standard [the statute] provided for the licensing of stations was the 'public interest, convenience, or necessity.' Denial of a station license on that ground if valid under the Act, is not a denial of free speech."[5]

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[5]Similar decisions in which, for various reasons relating to the public interest, broadcast licenses were denied, thus completely suppressing the right to broadcast at all, are the following: *Federal Communic. Com. v. WOKO, Inc.*, 329 U.S. 223; *Immaculate Conception Church v. Federal Communic. Com.*, D.C. Cir., 320 F. 2d 795, *cert. den.* 375 U.S. 904; *Independent Broadcasting Co. v. Federal Communic. Com.*, D.C. Cir., 193 F. 2d 900, *cert. den.* 344 U.S. 837; *Mansfield Journal Co. v. Federal Communic. Com.*, D.C. Cir., 180 F. 2d 28.

These decisions take on an added significance when it is remembered that licensing is the classic example of the type of

(This footnote is continued on the next page)

The holding below, that by prohibiting a charge for reception of respondents' speech, free speech has been denied, flies into the face of the decisions of which *National Broadcasting* is typical. In the first place, the prohibition of a charge for reception "ends in no restraint upon expression . . ." [*Oklahoma Press. Pub. Co. v. Walling, supra,* 327 U.S. at 193.] It is unrealistic to say that such a prohibition must end in suppression of speech, when all around us is the example of the great and thriving television and radio industries, for reception of whose programs no charge is made. In the second place, to hold, as against the technique of "balancing," that the First Amendment interdicts all regulation, even the incidental or indirect, regardless of the public interest in furtherance of which the regulation is adopted, is to take a view of the Amendment that this court has never taken, despite vigorous efforts to get it to do so.[6] [*Konigsberg v. State Bar, supra,*

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suppression and censorship against which the guaranty of free speech and press was aimed; and that the power to grant a license necessarily imports the power to deny it. [See, *Leloup v. Port of Mobile,* 127 U.S. 640, 645; *Sault Ste. Marie v. International Transit Co.,* 234 U.S. 333, 340.]

[6]The "balancing" view of the First Amendment was most actively advocated by Mr. Justice Frankfurter; it is, in his statement of it, that the "demands of free speech in a democratic society . . . are best served by candid and informed weighing of the competing interests . . . We are to set aside the judgment of those whose business it is to legislate only if there is no reasonable basis for it . . ." [*Dennis v. United States,* 341 U.S. 494, 524-525, Frankfurter, J., concurring.] Opposed is the view frequently advanced by Mr. Justice Black that the absolute language of the First Amendment should be read and applied absolutely. [See, his separate concurring or dissenting opinions in: *Ginzburg v. United States* (Dec. 7, 1965) .... U.S. ...., 16 L. ed. 2d 31, 41; *El Paso v. Simmons,* 379 U.S. 497, 516, and the cases there cited in note 1; *New York Times v. Sullivan supra,* 376 U.S. at 293.]

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366 U.S. 49-50; *American Communications Assn. v. Douds,* 339 U.S. 382, 398-399.] The limitation of speech, if any, effected by the Free Television Act is incidental and indirect. Speech, as such, and its nature, content and extent are left untouched.

The primary and direct object of the Act is regulation, in what has been legislatively determined to be the public interest, of commercial activity. That public interest is the preservation of a potent source of free information, instruction and entertainment, freely and readily available to the public at large, the existence of which, it could be conceivably and reasonably believed, was threatened by so-called subscription TV. [See, the dissenting opinion of Mosk, J., below, 64 A.C. at 272-273, 411 P. 2d at 308-309, 49 Cal. Rptr. at 556-557; Petition, Appendix B, pp. 53-55, in which the showing in this regard is summarized.] Balanced against that interest is the fact that the Act effects no denial of respondents' right, if they are so minded, to disseminate whatever they wish by means of television. They are left, so far as anything in the Free Television Act is concerned, in exactly the same position as those who now are and for many years have been telecasting freely.[7] The First Amendment

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Even so, Mr. Justice Black has expressed agreement with the "cases suggesting that a law which primarily regulates conduct but which might also indirectly affect speech can be upheld if the effect on speech is minor in relation to the need for control of the conduct . . ." [*Barenblatt v. United States,* 360 U.S. 109, 141, Black, J., dissenting.]

[7]The situation in this respect is akin to the one in *Estes v. Texas,* 381 U.S. 532, 539-540, 541-542, where, in response to the contention that barring of television from the courtroom during a trial was an abridgment of freedom of the press, it was pointed out that the television medium was free to cover the trial and inform the public in exactly the same way as other media—*i.e.,* by the presence and accounts of its reporters.

guarantees no more than that. It does not guarantee a right to charge for receiving (or hearing or seeing) one's exercise of the right of free speech or press, any more than it guarantees that one may compel another to hear or listen to a constitutionally secured expression of view or opinion.[8]

In balancing the governmental interest in preserving a source of popular enlightenment against denial of the power to charge a fee that is not essential to the business of telecasting, it "would be strange indeed however if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom . . ." [*Associated Press v. United States,* 326 U.S. 1, 20.] Yet, that is what has been done below. Legislation designed to preserve and encourage a widespread and publicly beneficial exercise of the right of free press has been held, because of the guaranty of such a press, to be beyond the State's power of regulation. That anomalous result highlights the fact that in an important area of constitu-

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[8]If there is a right to charge, it is one secured by substantive due process apart from any incorporation of the First Amendment—a right which respondents contended below had been unconstitutionally abridged by the Free Television Act. Neither court below put any apparent stock in that contention, for neither of them saw any need to discuss it. Rejection of respondents' due process contention is significant, however, in relation to free speech. It shows that it was not beyond the power of the legislature to determine that there was a reasonably conceivable state of facts that justified, in the public interest, the proscription of a charge for reception.

Would a governmental interest in preserving and encouraging an informed electorate be outweighed by a broadcaster's right to select when, how and what he will disseminate, so as to invalidate under the First Amendment, "equal time" statutes or regulations?

tional adjudication, the Court below has failed to appreciate and, therefore, has misapplied the decisions of this Court.

2. The "Clear and Present Danger" Test Was Erroneously Transformed Into a Means Whereby the Court Below Could Substitute Its Notions of Wise Policy for Those of the Legislature in a Matter Committed to the Legislature.

The court below misinterpreted the "clear and present danger" test and thus applied it in a way that subverts the teachings of this Court's decisions. It did not use that test as an objective standard by which to ascertain whether there is reasonable support for a legislative determination of the importance of the interest sought to be protected and of the necessity for the limitation of speech effected. Instead, it transformed the test into a device for substituting its judgment of the wise and desirable policy for that of the legislative department. [See, *e.g.*, Petition, Appendix B, pp. 24-29, 33; 64 A.C. at 252-255, 257-258, 411 P. 2d at 294-297, 299, 49 Cal. Rptr. at 543-545, 547.] That test was never intended to be a means by which a state court could invalidate, on federal grounds, a statute it did not like.

No doubt when the effect of legislation aimed at other interests is an incidental or indirect limitation of speech, the competing interests involved must be weighed or balanced. [See, *e.g., Konigsberg v. State Bar, supra,* 366 U.S. at 50-51, and the cases there cited.] But, at least in the first instance, weighing is the function of the legislature. [See, *Dennis v. United States, supra,* 341 U.S. at 539-540, Frankfurter, J., concurring; *Whitney v. California,* 274 U.S. 357, 374, Brandeis, J., con-

curring; *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 497; *Gitlow v. New York*, 268 U.S. 652, 670.] The court's function is not basically different from what it is in any case in which a prerequisite to constitutionality is a reasonable relationship between the governmental interest involved and the limitation of individual right effected. [*Cf., Miller v. Schoene*, 276 U.S. 272, 279-280; *Berman v. Parker*, 348 U.S. 26, 33; *Day-Brite Lighting Co. v. Missouri, supra*, 342 U.S. at 425.] That function is to determine objectively whether it can be reasonably said, *i.e.*, could reasonable men believe, that the posited relationship exists. It is not to substitute its notions of wisdom or good policy for those of the legislature. The "problem is legislative where there are reasonable bases for legislative action . . ."[9] [*Breard v. Alevandria, supra*, 341 U.S. at 632-633.]

The court below, as the consequence of its professed view of the merits of the legislation, was enabled to balance away the governmental interest in it. That interest, as was expressly declared in the Act, was to preserve a source of public enlightenment and entertainment, against which the incidental, and indeed non-existent, limitation of speech effected by the Act was of lesser public importance. The relative weight of those interests was not a judicial question; the only judicial question was whether reasonable men could believe that there was

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[9]Of course, the principle is not different when the "legislature" is the people acting directly rather than through their representatives. [*Cf., Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713, 736-737. And, see: *Wallace v. Zinman*, 200 Cal. 585, 592, 254 Pac. 946, 949; *State v. Richardson*, 48 Ore. 309, 319, 85 Pac. 225, 229; *Commonwealth v. Higgins*, 277 Mass. 191, 178 N.E. 536, 537; *State v. Hogue*, 67 N.D. 251, 271 N.W. 677, 680.]

a basis in conceivable fact for the legislative determination. The court, however, arrogated to itself functions that are not open to it in deciding questions of federal constitutional law.[10]

3. The Court Below Failed to Give Due Consideration or Effect to the Decisions of This Court Refusing to Insulate Organs of the Commercial Press From Business Regulation.

It is plain that the court below treated this case as one of complete prohibition of speech. [See, *e.g., Petition,* Appendix B, pp. 24, 25; 64 A.C. at 251, 252, 411 P. 2d at 294, 295, 49 Cal. Rptr. at 542, 543.] When that is in fact the case, balancing or weighing may have only a small role to play. But, when the statute in question is aimed at another object, properly within the regulatory competence of government, an incidental or indirect effect on speech, as has been seen, requires that it be weighed or balanced against the governmental interest involved. The cases that perhaps best illustrate this proposition are those in which the defense to statutory regulation of business was invocation of the First Amendment. The upshot of the decisions is the proposition that, ". . . As the press has business aspects it has no special immunity from laws applicable to business in general . . ." [*Mabee v. White Plains Pub. Co.,* 327 U.S. 178, 184.]Pretty gen-

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[10]Manifestly, when it is a federal constitutional question that is involved, a state court cannot circumvent or subvert the claimed federal right by quirks of procedure or techniques of adjudication. This court will decide for itself whether the fair result of the decision below is to deny the right. [*Cf., Rogers v. Alabama,* 192 U.S. 226, 230-231; *Davis v. Wechsler,* 263 U.S. 22, 24-25.]

erally, in those cases, the governmental interest in preventing abusive, fraudulent or harmful business practices has been held to outweigh the incidental or indirect effects on speech.[11]

The court below gave virtually no consideration to the economic or business-regulation aspect of the Free Television Act. Indeed, the only consideration given was to denigrate the Act's primary objective, notwithstanding an express legislative declaration of it. [See, *Petition,* Appendix B, pp. 24-29, 33; 64 A.C. at 251-255, 257-258, 411 P. 2d at 294-297, 299, 49 Cal. Rptr. at 542-545, 547.] The relevant decisions [see *notes* 2, 5 and 11, *supra*] leave no doubt that speech, merely because it is speech, does not have primacy over economic regulation that is not designed to have and which does not have a direct effect on the right to speak. No doubt, the antitrust, labor-management and consumer-protection policies weighed in those decisions are important, and the government's interest in them is strong. But as much may rationally be said of a policy of encouraging public enlightenment and preserving a valuable means

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[11]In addition to those cited in notes 2 and 5, *supra,* the following cases are illustrative: *Associated Press v. United States,* 326 U.S. 1, 19-20—application of antitrust laws to a combination of newspaper publishers is not a denial of free press; freedom to publish is not freedom to keep others from publishing; *Oklahoma Press Pub. Co. v. Walling, supra,* 327 U.S. at 192-193—application of the Fair Labor Standards Act to a newspaper is not a denial of free press as it "ends in no restraint upon expression . . ."; *Donaldson v. Read Magazines,* 333 U.S. 178, 189-192—advance barring of fraudulent advertisements from mails is not a denial of free speech.

of acquiring it. Such a policy cannot be rejected out of hand because of dislike of the method of effectuating it.[12]

Conclusion.

The petition for a writ of certiorari to the Supreme Court of the State of California should be granted.

Respectfully submitted,

HERMAN F. SELVIN,
Attorney for Amicus Curiae.

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[12]It is no argument against this view, that the means adopted to attain it consist of favoring one business or activity over another. [See, *Petition*, Appendix B, pp. 26-28; 64 A.C. at 253-254, 411 P. 2d at 296, 49 Cal. Rptr. at 544.] It has long been recognized, under the due process clause, that "the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public . . ." [*Miller v. Schoene, supra*, 276 U.S. at 279.] Since, for reasons already noticed, the relative value of free- and pay-TV had to be and were weighed by the legislature, its determination should prevail unless wholly devoid of rational basis.

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IN THE

Supreme Court of the United States

October Term, 1966
No. 188

FRANK M. JORDAN, etc.

Petitioner,

vs.

S. L. WEAVER, *et al.*,

Respondents.

Brief of Respondents in Opposition to Petition for a Writ of Certiorari to the Supreme Court of the State of California.

Respondents file this brief in opposition to the Petition for a Writ of Certiorari seeking review of the California Supreme Court's determination that the "Free Television Act" (the "Act") violates the free speech and free press provisions of both the United States and California constitutions. The Act purports to prohibit the conduct of all subscription television businesses in California.

Questions Presented.

1. Did the California Supreme Court base its decision that the Act is unconstitutional on an adequate and independent state ground (*i.e.*, Article I, §9 of the California Constitution)?

2. Does the Act violate the rights of free speech and free press of the First Amendment as incorporated in the Fourteenth Amendment to the Constitution?

3. Does the Act violate the equal protection clause of the Fourteenth Amendment?[1]

Statement.

Respondents seek to conduct a subscription television business in California. In December 1964 respondents submitted articles of incorporation to petitioner for the purpose of creating a corporation to conduct their proposed subscription television business. Petitioner declined to file the articles on the ground that subscription television businesses in California were unlawful under the provisions of the Act.

Respondents commenced this action to obtain a judicial declaration that the Act is unconstitutional under *both* the federal and state constitutions and consequently that subscription television businesses may be conducted in California.

Respondents' Proposed Business.

Respondents' proposed business includes the establishment of a "closed circuit" subscription television system for the dissemination of television programs to the premises of subscribers over coaxial cable networks within the State of California. Respondents would

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[1]The court below found it unnecessary to determine this question. *Weaver v. Jordan*, 64 Adv. Cal. 243, 258, 411 P. 2d 289, 299 (1966).

present current motion pictures, sporting events, plays, educational programs and other special programs and attractions. Each subscriber will be required to pay a charge for the programs he chooses to view. Respondents will not transmit commercial advertising; their primary source of revenue will be the fees received from subscribers. [C. T. 3.][2]

Pertinent Provisions of the Act.

A crucial difference between the presently existing commercial television and subscription television is the method of collecting revenues: commercial television collects its revenues from advertisers; subscription television collects its revenues from subscribers. This difference provides the means by which the Act effectively prohibits subscription television (except in theatres).

The provisions of the Act which prohibit the conduct of subscription television businesses are contained in Sections 3 and 4. (Petition, Appendix A, p. 14.) Section 3 provides that the "public shall have the right to view any television program on a home television set free of charge" and that "no person shall, directly or indirectly, make a charge inconsistent with such right."

Section 4 provides that all executory contracts, agreements and understandings, "where inconsistent with such free transmission, are absolutely void and are not enforceable."

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[2]Clerk's Transcript on Appeal.

REASONS FOR DENYING THE WRIT OF CERTIORARI.

1. THE DECISION OF THE CALIFORNIA SUPREME COURT WAS FOUNDED UPON AN ADEQUATE AND INDEPENDENT STATE GROUND.

This Court has consistently declined to review the decisions of state courts ruling on federal questions when it is clear the state court also predicated its decision upon an independent and adequate state ground. *Jankovich v. Indiana Toll Road Commission,* 379 U.S. 487 (1965); *City of New York v. Central Savings Bank,* 306 U.S. 661 (1939); *Fox Film Corp. v. Muller,* 296 U.S. 207 (1935). The rule is applied even though the state court did not separately analyze the effect of the state and federal constitutional provisions. *Jankovich v. Indiana Toll Road Commission, supra,* 379 U.S. at 489-492. As recently stated by this Court in *Mental Hygiene Dept. of Cal. v. Kirchner,* 380 U.S. 194 (1965):

> ". . . we would have jurisdiction to review only if the federal ground had been the *sole* basis for the decision, or the state constitution was interpreted under what the state court deemed the compulsion of the Federal Constitution. . . ." 380 U.S. at 198.

In *Jankovich v. Indiana Toll Road Commission,* this Court was faced with determining whether or not it should review a decision of the Indiana Supreme Court declaring unconstitutional an airport zoning ordinance. In its opinion, the Indiana Supreme Court stated that the issue was whether the ordinance was invalid under both the federal and Indiana constitutions. However in

resolving the issue, the Indiana Supreme Court did not analyze separately the effect of the two constitutional provisions but considered them together. This Court granted a writ of certiorari to review the lower court's decision and then reversed its decision and dismissed the writ as improvidently granted. It was held the Indiana Supreme Court's decision was based on an adequate and independent state ground:

> ". . . even though a state court's opinion relies on similar provisions in both the State and Federal Constitutions, the state constitutional provision has been held to provide an independent and adequate ground of decision depriving this Court of jurisdiction to review the state judgment." 379 U.S. at 492.

The opinion below shows without question that the California Supreme Court intended to base its decision upon Article I, §9 of the California constitution separately and independently of the federal constitution.[3]

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[3]Article I, §9 provides in part:

"Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."

Throughout this proceeding respondents have consistently relied upon Article I, §9 of the California constitution as a separate ground of decision. In their notice of motion for summary judgment the grounds set forth for invalidating the Act were that the Act was ". . . unconstitutional and invalid under both the United States and California Constitutions." [C. T. 36.]

In its judgment, the trial court expressly stated that the Act ". . . is invalid and unconstitutional because it abridges freedom of speech contrary to the provisions of the First and Fourteenth Amendments to the Constitution of the United States and of Section 9, Article 1, of the Constitution of the State of California." [C. T. 50.]

At the commencement of its opinion, the court states:

> "For reasons which will appear, we have concluded that the trial court correctly determined the Act to be invalid as an abridgment of the free speech guaranties of state and federal constitutions."

64 Adv. Cal. at 246; Petition, Appendix B, p. 17.

Throughout the opinion, the court cites and relies on California authorities. California authorities are cited for each proposition necessary to sustain the court's determination under Article I, §9. See 64 Adv. Cal. at 249-255; Petition, Appendix B, pp. 22-27.

The court concludes its opinion by "affirming" the trial court's judgment, after specifically reciting in the body of its opinion:

> "The trial court concluded that the Act abridges *both* the state and federal constitutional guarantees of free speech. (U.S. Const., Amendments I and XIV; Cal. Const., Art. I, §9)"

64 Adv. Cal. at 248-249; Petition, Appendix B, p. 21. (Emphasis added.)

The assertion by petitioner that the California Supreme Court "relied solely on the First and Fourteenth Amendments of the U.S. Constitution" is unfounded and wholly without merit. (Petition, p. 5.) This Court should not assume jurisdiction and review the decision below.

2. THE ACT ABRIDGES FREEDOM OF SPEECH AND PRESS; THE JUDGMENT BELOW IS IN ACCORDANCE WITH THE APPLICABLE DECISIONS OF THIS COURT.

The constitutional deficiencies of the Free Television Act are patent. The Act prohibits the conduct of a subscription television business in California and in so doing suppresses a medium of communication.

Specifically, the Act violates First Amendment rights on two separate and independent grounds. First, there is no clear or present danger of a substantive evil against which it protects. Second, under any set of facts advanced, the Act's prohibitions are much broader than necessary to cure the supposed "evils" at which it is directed, assuming they exist; its overly broad provisions cause the Act to violate the constitutional principle that a statute may restrict First Amendment rights only to the extent necessary to accomplish its legitimate objectives.

(a) The Act Does Not Protect the Public Interest Against a Clear and Present Danger.

Television is a form of communication protected by the First and Fourteenth Amendments. *Rumely v. United States,* 197 F. 2d 166, 177 (D.C. Cir. 1952); *American Broadcasting Co. v. United States,* 110 F. Supp. 374, 389 (S.D.N.Y. 1953), *aff'd on other grounds,* 347 U.S. 284 (1954).

In order to escape invalidity under the First Amendment, the Act must protect the public against a clear and present danger of a substantive evil which the

state has a right to prohibit. *Schenck v. United States*, 249 U.S. 47, 52-53 (1919); *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *Bridges v. California*, 314 U.S. 252, 262-263 (1941). The fact that the Act was passed by a majority of the electorate is not material. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638-639 (1943).

(1) It Is Not Likely the Alleged "Evils" Will Occur.

The "evil" at which the Act supposedly is directed is that subscription television will destroy or seriously impair commercial television. (Petition, pp. 7-8.) Petitioner states that this conclusion may reasonably be drawn from "judicially noticeable facts" but no facts are set forth. (Petition, pp. 7-8.) Nor can any facts be stated at this time before the subscription television industry has had a chance to operate. Certainly there is nothing whatsoever to indicate that respondents' proposed business will cause the alleged "evil."[4]

The same arguments of the destructive effect of subscription television on commercial television were presented to the Federal Communications Commission when the Commission first considered the advisability

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[4]After studying subscription television systems, and specifically the system to be used by respondent, the California Assembly Interim Committee on Public Utilities and Corporations concluded:

> "There are no pay television concerns presently operating in the State of California. This committee believes that until experience is gained from actual operations it is impossible to determine the extent of and requirement for legislation. Any attempt to draft legislation at this time is, in the opinion of this committee, premature. Accordingly, it is the recommendation of this committee to take no action until such time as experience is forthcoming from actual operations."

Report of the Assembly Interim Committee on Public Utilities and Corporations Relative to Pay Television; Assembly Interim Committee Reports 1959-1961, Vol. 17, No. 7.

of authorizing the testing of a subscription television system. The arguments were rejected. The Commission found that there was not sufficient evidence to warrant the conclusion that subscription television would destroy or even materially impair commercial television.[5]

Not even the Act's statutory recitals, drafted by its proponents, justify the proscription of subscription television businesses. Three statutory "evils" are recited. First, it is stated that subscription television will have an "adverse effect" upon presently licensed television stations. But the Act does not recite what kind of an adverse effect or how much of an adverse effect will occur. Next, the Act states that subscription television "would tend" to deprive members of the public of their freedom of choice. The Act does not state, however, the extent of this tendency or what choice the viewing public will be deprived of. Finally, it is stated that subscription television would "tend to create a monopoly." Again, the word "tend" and again there is no attempt to define the extent of the tendency or to describe the monopoly. (Act, §2; Petition, Appendix A, p. 13.)

(2) The Occurrence of the Alleged "Evils" Is Not Imminent.

Subscription television is in its infancy. It is hardly in a position to seriously impair the commercial television industry now or in the immediate future, assuming it ever will have the capability of so doing.

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[5]See *Report on Hearings on Subscription Television, House Committee on Interstate and Foreign Commerce* (1958), pp. 39 (Findings 51-55) and 47. The Commission's decision was upheld in *Connecticut Committee Against Pay TV v. F.C.C.*, 301 F. 2d 835 (D.C. Cir. 1962), *cert. denied* 371 U.S. 816 (1962).

The physical limitations alone in building a closed circuit television system and obtaining subscribers indicate that it will take years to establish a substantial system.

(b) The Act Imposes an Overly Broad Ban on a Medium of Communication.

A separate and independent ground for invalidating the Act is that its prohibitions are much broader than conceivably necessary to accomplish the Act's declared purpose. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Saia v. New York*, 334 U.S. 558 (1948).

It is not necessary to prohibit the conduct of all subscription television businesses—or in particular, respondents' proposed business—to achieve the Act's supposed statutory objectives. Regulatory agencies can adequately supervise subscription television businesses so as to preserve for the public all of their benefits and at the same time cure or eliminate any practices which experience demonstrates are adverse to the public interest.

The Act does not attempt to distinguish among different sizes of subscription television businesses or to select the type of subscription television business which likely might have the ability to cause the supposed evils. The Act applies to *all* subscription television businesses, no matter how small they may be, how they are operated, when they are operated or where they are operated in the State of California.

(c) The Act Bears a Strong Presumption Against Its Validity.

The Act, by prohibiting the establishment of subscription systems, imposes a prior restraint on communication and the dissemination of speech and entertainment. It bears a strong presumption of unconstitutionality. *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70 (1963); see also *United States v. C.I.O.,* 335 U.S. 106, 139-140 (1948).

(d) The Act Prohibits the Dissemination of Speech and Entertainment by Prohibiting Charging for Viewing Television Programs.

Petitioner and amicus Fox West Coast Theatres Corporation contend the Act does not prohibit the dissemination of speech but only a charge for viewing. They argue that respondents are free to use other media for transmitting the programs; thus there is no abridgment of expression. (Petition, pp. 6-7; amicus Fox West Coast Theatres Corporation brief, pp. 6-8.)

These arguments ignore the most important aspect of the Act, its effect. They also ignore the very basic concept that the First Amendment protects all forms of communication, not just a privileged few. *Associated Press v. United States,* 326 U.S. 1, 20 (1944) ("The First Amendment . . . rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . . Freedom to publish means freedom for all and not for some.").

It is the effect of a statute, not its form, by which it must be judged. *Near v. Minnesota,* 283 U.S. 697, 708 (1931); *Schneider v. Town of Irvington,* 308 U.S. 147, 161 (1939). The effect of the Free Television Act is to deprive subscription television businesses of their source of revenue and to prevent respondents from establishing a subscription television system and disseminating speech and entertainment over that system.

The Act's prohibitory effect upon subscription television is precisely the same as a statute, for example, prohibiting daily newspapers from charging customers for receiving papers.

In *Grosjean v. American Press Co.,* 297 U.S. 233 (1936), this Court recognized the vice inherent in statutes such as we have here. The statute in *Grosjean* imposed a 2% tax upon the gross receipts of newspapers making a "charge" for advertising and having a circulation of over 20,000 copies per week. It was held that the statute was an unconstitutional abridgment of First Amendment rights. This Court reasoned that the statute "in the guise of a tax" had the effect of curtailing revenue and thus restricting circulation. As such, the effect of the statute was ". . . to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties." 297 U.S. at 250.

If subscription television businesses cannot charge subscribers, their ability to present "box office attractions" to limited audiences is destroyed; their ability to present continuous programs without commercials is destroyed; their ability to use closed circuit systems with superior transmission qualities is foreclosed. In short,

the characteristics distinguishing subscription television from commercial television are destroyed.

The fact that other media of communication may be available to respondents (it is assumed) is completely beside the point. In most instances other media exist, yet that fact cannot justify the Act's prohibitions. See, *e.g., Saia v. New York,* 334 U.S. 558 (1948) (The fact that defendant could have used other media for political campaigning—*e.g.,* handbills or radio—did not justify the state's prohibiting the use of sound trucks for campaigning.).

(e) The First Amendment Protects Enterprises Engaged in Disseminating Information Irrespective of Whether They Are Conducted for Profit.

The fact that respondents intend to charge subscribers for viewing subscription television programs in no way diminishes the protection afforded by the First Amendment. See *New York Times v. Sullivan,* 376 U.S. 254, 266 (1964): *Burstyn v. Wilson,* 343 U.S. 495, 501-502 (1952).

3. THE ACT VIOLATES THE EQUAL PROTECTION CLAUSE.

The equal protection clause of the Fourteenth Amendment requires that statutory discriminations be based on differences reasonably related to the purposes of the statutes in which they are found. *Morey v. Doud,* 354 U.S. 457 (1957).

The principal purpose of the Act is to preserve and further the viewing public's ability to enjoy television by promoting its "freedom of choice with respect to television programs." Act, §2; Petition, Appendix A, p.

13. It is the viewing public's ability freely to choose among varied and different kinds of programs which best serves its interests.

The Act discriminates against subscription television businesses generally, and respondents' proposed business in particular, in a major respect: it effectively forbids subscription television transmitted for viewing on "home television sets" but permits commercial television to transmit to such sets. Act, §§3 and 4; Petition, Appendix A, p. 14. This discrimination is not based on differences reasonably related to furthering the purpose of the Act. Subscription television will supplement commercial television. It will increase, not decrease, the number and type of programs available to the viewing public.[6] The effect of the Act, therefore, is to defeat its avowed purpose.

Another arbitrary and unjustified discrimination perpetrated by the Act is that it exempts by omission theatre television (*i.e.*, it prohibits charging only for viewing on "home television sets"). The only difference between theatre television and the system proposed by respondents is that the former charges each viewer for the privilege of watching television programs

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[6] *E.g.*, respondents would transmit first-run motion pictures. As the Federal Communications Commission found in authorizing the first experimental subscription television tests in Hartford, Connecticut, ". . . first-run feature films have not, with rare exceptions, been made available for television broadcasting. Nor is there any indication that they are likely to become available in the foreseeable future for free broadcasting. Thus, to the extent that first-run films might become a substantial feature of on-the-air [subscription television], transmissions they would provide a kind of entertainment not now generally available to the television audience." See *Report on Hearings on Subscription Television, House Committee on Interstate and Foreign Commerce* (1958), p. 31, Finding 50.

projected on theatre screens, while the latter charges only subscribers (no matter how many viewers) for observing programs transmitted to their home television sets. This difference does not justify the discrimination between these two methods of communication to the very obvious competitive advantage of theatre television businesses.[7] *Cf. Morey v. Doud*, 354 U.S. 457, 465-467, 469 (1957).

Conclusion.

The Petition for a Writ of Certiorari to the Supreme Court of California should be denied.

Respectfully submitted,

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[7]Theatre owners were the original proponents of the Act.

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IN THE

Supreme Court of the United States

October Term, 1965

No. [redacted] 188

FRANK M. JORDAN, Secretary of State, of the State of California,
Petitioner,

vs.

S. E. WEAVER, D. E. O'NEIL and T. F. GREENHOW,
Respondents.

Brief of International Telemeter Corporation, Amicus Curiae, in Opposition.

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IN THE

Supreme Court of the United States

October Term, 1965
No. 1370

FRANK M. JORDAN, Secretary of State, of the State of California, *Petitioner,*

vs.

S. L. WEAVER, D. E. O'NEIL and T. F. GREENHOW, *Respondents.*

Brief of International Telemeter Corporation, Amicus Curiae, in Opposition.

The parties hereto having consented to the filing of this brief, International Telemeter Corporation respectfully submits the same as a friend of the Court and respectfully suggests that the Writ be denied upon the grounds and for the reasons hereinafter set forth.

Interest of the Amicus Curiae.

The interest of this amicus curiae (hereinafter Telemeter) in this action and in the questions presented arises from the fact that it is engaged in the business of manufacturing, developing, improving and selling assembled components, known as "telemeter systems," for the origination, transmission and reception of pay television programs in private homes in California and elsewhere and in the business of selling franchises to others to use its equipment in the presentation of such programs. The so-called "Free Television Act" (1 Cal. Stats. 1965, p. A-132) has deprived Telemeter of its

market for the sale of its said equipment and franchises in California. A substantial part of such equipment, particularly distributors' units and home receiving units, including patented electronic pay metering and recording equipment, is manufactured in Pennsylvania and Illinois and thereafter shipped to California for assembling. The Act also deprives Telemeter of the right, under its articles of incorporation and its certificate of qualification to do business in California, to use pay television systems in California in selected test areas for the proper and necessary development and improvement of its said pay television telemeter systems and the components thereof destined for sale in interstate commerce and, but for said Act, in California. Telemeter and its predecessors in interest in the carrying on of said business have expended over $5,000,000 in the last 15 years in the development of said business.

For the reasons given, Telemeter is vitally interested in the question of whether the Act is unconstitutional, as held by the Supreme Court of California, or the reverse, as contended by Petitioner.

The Grounds for the Denial of the Writ.

These are:

I. Jurisdiction.

It is respectfully suggested that the Court should decline jurisdiction for the reason that the Supreme Court of California decided the cause upon an adequate and independent nonfederal ground: That the "Free Television Act" abrogates freedom of speech and of expression within the intendment of Section 9 of Article I of the Constitution of California. *Jankovich v. Toll Road Commission*, 379 U.S. 487, 489-90.

II. Merits.

The Supreme Court of California decided the federal question relating to the abrogation by the "Free Television Act" of freedom of speech and of expression in a manner wholly in accord with applicable decisions of this Court.

Summary of the Argument.

As regards the question of jurisdiction, the California Supreme Court's judgment rests upon an adequate and independent nonfederal ground, namely, that the Act is obnoxious to Section 9 of Article I of the California Constitution which guarantees freedom of speech as a matter of state law. This is not a situation where, as the cases say, the state ground is so interwoven with the federal as to sustain the Court's jurisdiction. On the contrary, the intention of the California court to adjudicate the unconstitutionality of the offending statute under state law is clear; and the adequacy of this ground to uphold the judgment is not open to question. Moreover, the California Supreme Court has held that the coverage of its Section 9 of Article I is broader than that of the First Amendment, which is but another way of saying that the "Free Television Act" independently and *a fortiori* offends Section 9 of Article I. The result is that the state court's holding as to Section 9 of Article I presents a clear example of an adequate and independent state ground of decision.

Turning to the merits, the suppression by the "Free Television Act' of the proscribed medium is complete; the Act amounts to total censorship, in advance, so far as transmission to and reception in the home are concerned. There are two cardinal principles which are fundamental in a free speech case. The first is that

plausible or colorable justifications which might support a legislative prohibition of certain activities in the ordinary fields of commerce and industry will not suffice where freedom of expression is denied. The second is that where, as here, a statute prohibits freedom of speech or of expression in advance, it comes before the courts bearing a heavy presumption *against* its validity. The "Free Television Act" is therefore to be evaluated as to its constitutionality, not only without benefit of any presumption as to its validity, but rather burdened with a strong presumption running in the other direction.

The First Amendment protects both the means and the content of communications to others. It protects the right of the public to see, to listen and to hear, as well as the right of a given medium to disseminate material of general interest. It protects not some, but all means and media of expression, and it protects communications made in the course of commercial endeavor. Accordingly, it may not be evaded by prohibiting the sale or distribution of protectible material.

The Act evidences, not a valid attempt to regulate a business, but rather an attempt to suppress a qualified medium for the dissemination of news, views and entertainment. The Act is no more valid as a prior restraint than would be an enactment forbidding home distribution of newspapers to their paid-up subscribers. The suppression of freedom of speech and of expression implicit in the Act is wholly without justification or valid excuse. The Act fails to meet either the clear and present danger test or the *ad hoc* balancing test, from which it follows that the action of the California Supreme Court in voiding the statute is wholly in accord with applicable decisions of this Court.

ARGUMENT.

I.

THE SUPREME COURT OF CALIFORNIA HELD, AS AN INDEPENDENT AND ADEQUATE NONFEDERAL GROUND OF DECISION, THAT THE ACT IS OBNOXIOUS TO SECTION 9 OF ARTICLE I OF THE CALIFORNIA CONSTITUTION.

The California Constitution contains its own guarantees of freedom of speech and of expression. Section 9 of Article I provides:

> "Sec. 9. Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. . . ."

It has been said that the protective coverage of Section 9 is broader than the guarantees of the First Amendment. *Dailey v. Superior Court,* 112 Cal. 94.* The *Dailey* case was a proceeding in certiorari to review the action of the San Francisco Superior Court in issuing an order requiring the petitioner to cease and desist from the presentation of a play assertedly based upon the facts of a criminal trial then pending. The writ annulling the lower court's action was granted and the California Supreme Court, speaking of Section 9 of Article I, had this to say:

> ". . . The purpose of this provision of the constitution was the abolishment of censorship, and for courts to act as censors is directly violative of that purpose. This provision of the constitution as

**Daily v. Superior Court* was cited in *Near v. Minnesota, infra,* 283 U.S. at 719, n. 11, as to the constitutional impropriety of prior restraints.

> to freedom of speech varies somewhat from that of the constitution of the United States, and also more or less from the provisions of many state constitutions treating of this question; but, if there is a material difference in the various provisions, it works no harm to this petitioner, *for the provision here considered is the broader, and gives him greater liberty in the exercise of the right granted.*"* (112 Cal. at 97-98.)

This is the equivalent of saying that an abridgment of the First Amendment guarantee of free speech is independently and *a fortiori* obnoxious to Section 9 of Article I.

It was in the light of these principles of California law that the California Supreme Court held in the instant case:

> "... For reasons which will appear, we have concluded that the trial court correctly determined the Act to be invalid as an abridgement of the free speech guaranties of *state* and federal constitutions." (*Weaver v. Jordan*, 64 Adv. Cal. 243; Petition, Appendix B, 17.)

In addition to the decisions of this Court, the California Supreme Court cited the following California cases dealing with the free speech guarantees of both the state and federal constitutions. *Katzev v. County of Los Angeles*, 52 Cal.2d 360, 365; *American Civil Liberties Union v. Board of Education*, 55 Cal.2d 167, 171; *Wrather-Alvarez, etc., Inc. v. Hewicker*, 147 Cal.App. 2d 509, 512; *Zeitlin v. Arnebergh*, 59 Cal.2d 901, 908-909; *Canon v. Justice Court*, 61 Cal.2d 446, 451.

*Emphasis here, as elsewhere, is supplied unless otherwise noted.

The California court also stated the trial court's holding in the following language:

> ". . . The trial court concluded that the Act abridges both the state and federal constitutional guarantees of free speech. (U.S. Const., Amendments I and XIV; Cal. Const., Art. I, § 9.)"

And it was the trial court's judgment predicated upon these twin conclusions, which the state supreme court upheld, upon the same grounds.

In these circumstances the present case falls squarely within the pattern of such cases as *New York City v. Central Savings Bank*, 306 U.S. 661 (and see opinion below, 280 N.Y. 9, 10) and *Jankovich v. Toll Road Commission, supra*, 379 U.S. 487. The situation presented in each of those cases was identical with the situation here: the state court, there as here, had held a statute unconstitutional on both federal and state grounds. In the *Central Savings Bank* case certiorari was denied *per curiam* for that reason; in *Jankovich* the writ was dismissed as having been improvidently granted, 379 U.S. at 489, 495.

Jankovich completely answers the contention made by petitioner Jordan that the state ground is so interwoven with the federal as to render the Court unable to conclude that the judgment rested upon an independent application of state law.*

In *Jankovich*, the Court said:

> "As we have concluded that respondent is correct in its contention that the judgment sought to be re-

*The remedy in such a situation — which is *not* the situation here — would seem to be to send the cause back to the lower court for clarification. See, *e.g.*, *Minnesota v. National Tea Co.*, 309 U.S. 551; and see dissenting opinion in the case under discussion: *Jankovich*, 379 U.S. at 495-496.

viewed is supported by an independent and adequate state ground, we dismiss the writ of certiorari as improvidently granted.

"In the Indiana Supreme Court respondent relied on the just compensation requirement of the Indiana Constitution as well as on the Due Process Clause of the Fourteenth Amendment. The Indiana Supreme Court stated the issue for decision as whether 'the ordinance purport[s] to effect a taking of private property for public use in violation of the provisions of Article 1, § 21, of the Indiana Constitution and the Fourteenth Amendment to the Constitution of the United States.' 244 Ind., at 577, 193 N.E.2d 238. In resolving that issue, however, the Indiana Supreme Court, quite understandably, did not analyze separately the effect of the two provisions but considered them together. From that fact petitioners would have us conclude that the state ground of decision—invalidity of the zoning ordinance under Art. I, § 21, of the Indiana Constitution—'is so interwoven with the other as not to be an *independent matter*. . . .' *Enterprise Irrig. District v. Canal Co.*, 243 U.S. 157, 164 (dictum). (Emphasis added.) We cannot agree." (379 U.S. at 489-490.)

Following further discussion and analysis of the state court's decision, the Court then went on to hold, in language fully applicable here, that "[I]ndeed, the organization and language of the opinion indicates that, at the least, state law is an equal ground of decision." 379 U.S. at 491.

For the reasons given, it is respectfully suggested that certiorari should be denied because the decision below is based upon an independent and adequate non-federal ground.

II.

THE DECISION OF THE CALIFORNIA SUPREME COURT IS WHOLLY IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

The key question presented on the merits concerns the muzzling of free speech evidenced by the subject California statute, namely, the so-called "Free Television Act," adopted as an initiative measure at the general election held in California on November 3, 1964.

The purpose and effect of the Act is to outlaw subscription or pay television to the home through the means of suppressing this medium of communication. In addition, the statute avowedly discriminates in favor of what it is pleased to term "free television"—which is to say commercially sponsored television—transmitted for home consumption. And, *sub silentio,* it also discriminates in favor of pay television transmitted for viewing by theatre audiences.

These discriminatory features, however, are secondary. The basic vice of the measure consists, as indicated above, in its arrant suppression of freedom of speech and of expression; and it is to this vice, fatal to the validity of the statute, that this brief is directed so far as the merits are concerned. We shall show, in this regard, that the decision of the California Supreme Court is wholly in accord with applicable decisions of this Court.

A. The So-Called "Free Television Act" Abrogates Freedom of Speech and of Expression Within the Intendment of the First Amendment to the Constitution of the United States, as Made Applicable to State Action by the Due Process Clause of the Fourteenth Amendment.

The Act is quite clear that no one may speak or disseminate ideas to the home through the medium of pay television; it is equally clear that, *ex necessitate,* no one, in the home, may listen to a pay television transmission or receive transmitted ideas or images conveying such ideas over the outlawed medium. The suppression of the proscribed medium as a vehicle of transmission to the home is complete; it amounts to total censorship, in advance, so far as home viewers are concerned. The bar is as absolute as would be an enactment prohibiting the circulation to the home of newspapers for which a price is charged. Authorities dealing with the abridgment of freedom of the press, as well as of speech, are therefore fully apposite here.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech or of the press. . . ." And it is now settled that, since these rights are fundamental, the Fourteenth Amendment makes this proscription applicable to the states and to state action. *Near v. Minnesota,* 283 U.S. 697, 707; *Fiske v. Kansas,* 274 U.S. 380, 385; *Grosjean v. American Press Co.,* 297 U.S. 233, 243.

So, also, it is settled that communication by motion picture, by radio and by television are protected by the dual constitutional provisions safeguarding freedom of speech and of the press. *Rumely v. United States,* D.C. Cir., 197 F.2d 166, 177; *American Broadcasting Co.*

v. United States, S.D.N.Y. 110 F.Supp. 374, 389, aff'd 347 U.S. 284. And, by the same token, the right of free speech necessarily embodies the means used for its dissemination. *Saia v. New York,* 334 U.S. 558. Nor is the protection lost because a charge is made for the dissemination. *Cf. Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 501: motion picture; *New York Times v. Sullivan,* 376 U.S. 254, 266: paid newspaper advertisement; *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 64, n.6: pocket books.

At the threshold, and in view of certain of the contentions made by petitioner, it will be helpful to point out two cardinal principles which are fundamental in a free speech case.

1. Plausible or Colorable Justifications, Which Might Support a Legislative Prohibition of Certain Activities in the Ordinary Fields of Commerce and Industry, Will Not Suffice Where Freedom of Expression Is Denied.

The principle, frequently applied in so-called economic due process cases, that a statute will be upheld if any reasonable state of facts can be conceived which will sustain it, has no application to a statute denying free speech. This proposition has been made clear by this Court.

Thus, in *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 639, the Court said:

> "In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it

also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. *Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard.* The right of a state to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. *But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds.* They are susceptible of restriction only *to prevent grave and immediate danger to interests which the State may lawfully protect.* It is important to note that while it is the Fourteenth Amendment which bears directly upon the State, *it is the more specific limiting principles of the First Amendment that finally govern this case.*" (319 U.S. at 639.)

And in *Thomas v. Collins,* 323 U.S. 516, 530, the Court said:

"For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. *The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice.* These rights rest on firmer foundation. *Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending.*" (323 U.S. at 530.)

And in *Griswold v. Connecticut,* 381 U.S. 479, it was said:

> "In other words, the State may not consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." (381 U.S. at 482.)

The short of it thus is that we are not dealing here with the mere regulation or suppression of business and industrial, which is to say *economic,* conditions which the legislative function, for reasons of its own, may deem offensive to the public welfare. On the contrary, we are dealing with an attempt by a state to outlaw a vehicle of free speech; a matter of far graver import.

That such is the operation and effect of the statute is not open to question. In *Near v. Minnesota, supra,* 283 U.S. at 708, the Court emphasized "that in passing upon constitutional questions the court has regard to substance and not to mere matters of form, and that, in accordance with familiar principles, the statute must be tested by its *operation and effect.*" Here, as in *Near,* the "object of the statute is not punishment, in the ordinary sense, but suppression" of the offending medium of communication. (283 U.S. at 711.)

Thus, judged by its operation and effect, as distinguished from its *motivation* as expressed in Section 2 of the statute, the Act suppresses free speech, the business of supplying news, views and entertainment via the proscribed medium and, last but far from least, the right of the viewing public to listen, to hear and to see. In such a situation, where personal liberties are concerned, this Court does *not,* in testing whether due process is offended, employ the formula of whether any

facts may be conceived which will sustain the offending legislation. As we have seen, the basic freedoms may not be infringed "on such slender grounds."

2. Where, as Here, a Statute Prohibits or Abridges Freedom of Speech or of Expression in Advance, It Comes Before the Courts Bearing a Heavy Presumption Against Its Validity.

This statute does more than censor or restrict, in advance, utterances over pay television, although that would be bad enough. It prohibits them entirely. In such circumstances it is not open to reasonable discussion that a heavy presumption lies *against* the validity of the measure. As this Court has said, "any system of prior restraints of expression comes before this Court bearing a heavy presumption against its validity." *Bantam Books, Inc. v. Sullivan, supra,* 372 U.S. 58, 70; *Freedman v. Maryland,* 380 U.S. 51, 57; *cf. Near v. Minnesota, supra,* 288 U.S. 697, 720.

It follows that this statute must be evaluated, as to its constitutionality in the light of the First Amendment, not only without benefit of any presumption as to its validity, but rather burdened with a presumption running in the other direction; and mere colorable justifications for the legislation will not suffice.

These fundamentals established, we now turn to the contentions raised in attempted justification of the subject statute.

B. The Attempts to Uphold the Validity of the Act Under the First Amendment Are Devoid of Merit.

Petitioner's case is that the State may, in the guise of regulation, prohibit a given means of communication, *i.e.*, pay teleision to the home. He denies that free speech is interfered with at all; one may speak or exhibit over television to his heart's content, he says, so long as no charge for the service is made to the viewer.

Petitioner's argument that the state may regulate by prohibiting a given means of expression strikes at the heart of the free speech guarantees of the First Amendment. This approach would lend sanction to the suppression of FM radio in favor of AM radio or newspapers or magazines; or, conversely, the suppression of any of the latter in favor of other media of communication.

Petitioner very nearly denies that one who, for a charge, supplies news or entertainment to the public, is entitled to the protection of the First Amendment. Under this reasoning, newspapers, magazines, motion pictures and other media operating on a commercial basis could be made the target for legislation such as that here under consideration. This argument proves far too much; it envisages, for instance, freedom of the *press* as encompassing nothing more than throwaway publications.

Thus it is no answer to say that all that is proscribed is the making of a charge for the right of others to hear or see the thoughts, ideas or opinions expressed through the television medium. This approach palpably evades the true object and effect of the Act, which is to suppress the expression of thoughts, ideas

or beliefs over the medium of pay television entirely. A similar statute in a related field could result in the suppression of paid circulation newspapers, periodicals or motion pictures. Once again the argument proves too much; it confuses the *means* of suppression with the *fact* of suppression.

With these preliminaries, we pass to a more detailed discussion of the points raised in attempted justification of the statute.

1. The First Amendment Protects Both the Means and the Content of Communications to Others.

The initial answer to petitioner's contentions is the proposition that the right of free speech necessarily embodies the *means* used for its dissemination, because the right is worthless in the absence of a meaningful method of its expression. *Saia v. New York, supra,* 334 U.S. 558; and *cf. Wollam v. Palm Springs,* 59 Cal. 2d 276, 284. Suppression of the means, therefore, is on a par with suppression of the content; and in the context of this case it is not open to reasonable discussion that the Act suppresses both the one and the other. And this, be it noted, wholly without reference to the content or manner of transmission or publication of the suppressed communications. No question is here raised as to program content: the definition of "Television Program" set out in Section 3 of the Act embraces both pay and commercially sponsored presentations. No question is raised, either, as to the manner of transmission or publication: closed or open circuit, precisely as commercially sponsored programs are or may be transmitted. The only objection is that pay television contemplates the making of a charge, precisely as does the conventional newspaper or movie house.

2. The First Amendment Protects Not Some, but All Means and Media of Expression.

The apparent thesis of petitioner that suppression of one means of communication is proper, so long as other means or media are left undisturbed, simply does not stand scrutiny. The camel may not thus get its nose under the tent; the guarantees of freedom of expression may not be whittled away one by one; *any* infringement of these guarantees will be promptly met and dealt with as it deserves. *Joseph Burstyn, Inc. v. Wilson, supra,* 343 U.S. 495: censorship of motion picture; *Near v. Minnesota, supra,* 283 U.S. 697: censorship in advance of newspaper by injunction; *Grosjean v. American Press Co., supra,* 297 U.S. 233: discriminatory tax on newspapers, based on paid circulation; *Winters v. New York,* 333 U.S. 507: prohibition against distribution of crime news magazine; *Smith v. California,* 361 U.S. 147: possession by bookseller of book not known by him to be obscene; *Bantam Books, Inc. v. Sullivan, supra,* 372 U.S. 58: censorship per "index expurgatorius" of pocket books; *Saia v. New York, supra,* 334 U.S. 558: sound truck.

3. The First Amendment Protects Communications Made in the Course of Commercial Endeavor.

Every case upholding the right of conventional, paid-circulation newspapers, books and periodicals and, as well, motion pictures; to freedom of expression and freedom from censorship, particularly in advance; wholly condemns this statute and repels the attempt to justify it upon the ground that a charge is made for pay television transmissions.* That the guarantees of free-

*"It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge." *Murdock v. Pennsylvania,* 319 U.S. 105, 111.

dom of speech and of the press extend to all such media in the business field is not even open to debate. See, *e.g., Joseph Burstyn, Inc. v. Wilson, supra,* 343 U.S. 495; *Near v. Minnesota, supra,* 283 U.S. 697; *Grosjean v. American Press Co., supra,* 297 U.S. 233; *Winters v. New York, supra,* 333 U.S. 507; *Smith v. California, supra,* 361 U.S. 147, 150; *New York Times v. Sullivan, supra,* 376 U.S. 254.

Burstyn met the contention of petitioner in this regard head-on:

> "It is urged that motion pictures do not fall within the First Amendment's aegis because their production, distribution and exhibition is a large-scale business conducted for private profit. We cannot agree. *That books, newspapers and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures."* (343 U.S. at 501, 502.)

Smith v. California was equally explicit;

> ". . . And it also requires no elaboration that the free publication and dissemination of books and other forms of the printed word furnish very familiar applications of these constitutionally protected freedoms. *It is of course no matter that the dissemination takes place under commercial auspices.* See *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495; *Grosjean v. American Press Co.,* 297 U.S. 233. Certainly a retail bookseller plays a most significant role in the process of the distribution of books." (361 U.S. at 150.)

And in *New York Times v. Sullivan, supra,* it was said, speaking of a paid advertisement:

> ". . . It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern. See *N.A.A.C.P. v. Button,* 371 U.S. 415,435. *That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold. Smith v. California,* 361 U.S. 147, 150; cf. *Bantam Books, Inc. v. Sullivan, supra,* 372 U.S. 58, 64, n. 6. . . ." (376 U.S. at 266.)

It is thus well settled that those engaged in the *business* of disseminating news, opinions, ideas or entertainment are entitled to the protection of such dissemination under the First Amendment. Thus the statute invalidated in *Winters v. New York, supra,* 333 U.S. 507, prohibited the sale of books or their possession with intent to sell. The statute invalidated in *Near v. Minnesota, supra,* 283 U.S. 697, interfered with the right to sell and distribute newspapers for profit. And so with *Bantam Books, Inc. v. Sullivan, supra,* 372 U.S. 58, in the case of pocket books. The tax invalidated in *Grosjean v. American Press Co., supra,* 297 U.S. 233, was held to have been aimed at curtailing the commercial distribution of newspapers and, moreover, was measured by the gross receipts from sales. The opinion in *Smith v. California, supra,* 361 U.S. 147, squarely upheld the right of a bookseller to have books in his possession for purposes of sale. *New York Times v. Sullivan, supra,* 376 U.S. 254, upheld the right to fair

comment through the medium of *paid* advertising. It is thus impossible to separate the throttling of sales from the resultant throttling of freedom of expression, as our adversary vainly attempts to do.

4. The First Amendment Protects the Right of the Public to Listen as Well as the Right of a Given Medium to Disseminate Material of General Interest.

Marsh v. Alabama, 326 U.S. 501, had to do with the attempted enforcement, in a "company" town, of a state statute making it a crime for anyone to enter or remain on the premises of another after having been warned not to do so. Appellant, a Jehovah's Witness engaged in distributing religious literature, was arrested under the statute and convicted. The Court reversed. Holding that the protection of the First Amendment extends to the right to listen as well as the right to speak, the Court said, speaking of the people of the town:

> *". . . To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored. There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is curtailing these freedoms with respect to any other citizen."* (326 U.S. at 508-509.)

It thus abundantly appears that the subject Act violates the First and Fourteenth Amendments in two different but interrelated aspects: it prohibits both the dissemination to and reception by the public of material of general interest.

5. The Act Evidences, Not a Valid Attempt to "Regulate" a Business, but Rather an Attempt to Suppress a Qualified Medium for the Dissemination of News, Views and Entertainment.

Here, as in *Near v. Minnesota, supra,* 283 U.S. 697, 711, 712, the Court is entitled to look at realities; and here, as there, the object of the statute is suppression of the offending media, which "suppression is accomplished by" the terms of the statute; and, most important of all, here, as there, "restraint is the object and purpose of the statute."

These principles lead to the destruction of two basic propositions advanced by our adversary. These are, first, that because commercial disseminators of news and other matters are subject to police power regulations as to their business affairs, this somehow gives the State of California a license to suppress free speech by a statute *having that object and purpose. Cf. Near v. Minnesota, supra,* 283 U.S. at 708.

The Federal Communications Commission of course has power to grant, revoke and suspend licenses for over-the-air transmission. This is a matter of regulation of a business; no more and no less. But neither the Federal Communications Commission, nor Congress nor any state has the power, wholly unrelated to regulation of business *qua* business, to dictate what a newspaper or a broadcasting station shall say in the way of news, opinion, or entertainment, or how it shall say it, or least of all, prevent it from saying it at all. In other words, appropriate authority may regulate, it may tax, but it may not in the guise of either suppress news or other dissemination to the public merely for suppression's sake alone.

Mr. Justice Sutherland exposed a similar masquerade when he said, speaking for the Court in *Grosjean v. American Press Co., supra,* 297 U.S. 233:

> ". . . The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, *it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties.* A free press stands as one of the great interpreters between the government and the people. *To allow it to be fettered is to fetter ourselves.*" (297 U.S. at 250.)

So here, the short answer is that regulation *as* regulation of business may be one thing, but suppression as suppression is something else entirely and as such condemned by the First Amendment.

Breard v. Alexandria, supra, 341 U.S. 622, is relied upon by petitioner in this connection. That case sustained, as against First Amendment attack, a local ordinance prohibiting, and denominating a nuisance, door-to-door solicitations for magazine subscriptions without consent of the home owner. The court held, so far as free speech is concerned, that the great guarantees of free speech do not extend to forcing a community to admit the solicitors of publications to the home premises of its residents. The rationale of the decision was that door-to-door solicitation might properly be considered as a nuisance not involving utterances subject to protection (the magazines, when they arrived, contained those) and hence subject to reasonable regulation.

Here, of course, pay television is an *invitee* in and to the home, not a doorbell ringing nuisance. Pay television makes its appearance only if and when the householder so elects.* And here, the suppression is aimed directly at the utterance: the dissemination itself. *Breard* would, we apprehend, have resulted in quite a different holding had the ordinance in question barred the delivery to, or reception of, magazines previously subscribed for to the home which, in essence, is the case here. If it is of any aid whatever in the instant case, *Breard*, by contrast, aptly illustrates the wholesale invasion of free speech perpetrated by the subject Act. *Cf. Marsh v. Alabama, supra*, 326 U.S. 501.

Associated Press v. United States, 326 U.S. 1, with its advocacy of "the widest possible dissemination of information from diverse and antagonistic sources" (326 U.S. at 20) also is of more aid in illustrating the vices of the subject Act than in demonstrating its nonexistent virtues.

Clearly, the attempt to masquerade suppression in the guise of regulation will not do. Our adversary might as well argue that a statute prohibiting the sale of newspapers in the State of California would not transcend free speech limitations.

6. The Suppression of Freedom of Speech and of Expression Implicit in the Act Is Wholly Without Justification or Excuse.

Petitioner's contention that the test here applicable is the so-called *ad hoc* balancing test rather than the clear and present danger test is wholly refuted by the

*It will be recalled that Breard was arrested solely because he had not obtained the consent of the homeowners involved. (341 U.S. at 624.)

holdings in each and all of the cases earlier cited herein where the restraint or suppression was, as here, direct and imposed in advance. See, *e.g., Near v. Minnesota, supra,* 283 U.S. 697; *Joseph Burstyn v. Wilson, supra,* 343 U.S. 495; *Winters v. New York, supra,* 333 U.S. 507; and *Bantam Books, Inc. v. Sullivan, supra.* 372 U.S. 58.

Cases dealing with indirect or peripheral restraints, calling for the *ad hoc* balancing of the public interests involved, are therefore of no value here. *Breard v. Alexandria, supra,* 341 U.S. 622, cited, as earlier noted, by petitioner, is as good an example as any of the application of the balancing test. There was involved in that case, not the direct suppression of the sale of the periodicals involved—which is, in essentials, our case—but rather the conduct of the salesmen in trespassing upon private property against the will and without the consent of the property owner. As earlier pointed out, had Alexandria attempted to bar the sale or distribution of periodicals within its borders—which again, in essentials, is what California has purported to do here—the suppression would have been direct, as it is here and as it was, for instance, in *Marsh v. Alabama, supra,* 326 U.S. 501.

For the rest, the opinion of the California Supreme Court adequately points out the flimsiness of the justifications advanced by the statute itself, § 2, as an excuse for its existence; and the opinion also correctly points out the overbreadth of the Act even if credence be given to the speculative and illusory reasons advanced by it for its existence. Petition, Appendix B, 26-28; *cf. Shelton v. Tucker,* 364 U.S. 479, 488.

The result is that even if the *ad hoc* balancing test, rather than the clear and present danger criterion, were

to be applied in the present case, the Act would still be found wanting. As earlier noted, due to its direct and prior restraints of expression, the statute comes before this Court bearing a heavy presumption against its validity. And every case which we have earlier cited herein as bearing upon such restraints attests that such presumption is here not only not dispelled, it is fortified, under any test.

It is therefore respectfully suggested that, as to the merits, the California Supreme Court acted wholly in accord with applicable decisions of this Court in holding the Act invalid as a flagrant attempt to transgress the freedoms of speech and of the press guaranteed by the First Amendment.

Conclusion.

For all the reasons hereinabove given, this amicus curiae respectfully suggests that the decision of the Supreme Court of California rests upon the adequate and independent nonfederal ground that the subject Act is violative of the guarantees of free speech contained in the California Constitution; that in any event the holding of that court as to the invalidity of the Act under the First and Fourteenth Amendments is wholly in accord with applicable decisions of this Court; and that, accordingly, certiorari should be denied.

Respectfully submitted,

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